Exploring the Limits of Specific Personal Jurisdiction

LINDA SANDSTROM SIMARD*

During the nearly two decades since the Supreme Court recognized a bifurcated doctrine of personal jurisdiction, it has made little progress in defining the characteristics that distinguish general and specific jurisdiction. One of the issues that has repeatedly evaded the Court's attention is the scope of specific jurisdiction. While we know that the scope of general jurisdiction extends to any suit brought against a defendant, and specific jurisdiction is limited to "suits" that arise out of the defendant's contacts with the forum, the precise contours of specific jurisdiction remain unclear. In recognition of this theoretical deficiency, this article examines a particular category of cases—those involving jurisdictionally insufficient counts that arise out of the same factual event as jurisdictionally sufficient counts brought against the same defendant—to illuminate the theoretical question surrounding the scope of specific jurisdiction.

The article concludes that in most instances there will be no constitutional or statutory impediment to the federal court's exercise of pendent personal jurisdiction regarding jurisdictionally insufficient counts that arise out of the same constitutional case as a jurisdictionally sufficient anchor count, whether the basis for jurisdiction over the anchor count is a nationwide service of process statute or a state long-arm statute. Finding constitutional support for the exercise of pendent personal jurisdiction pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments, the article suggests that there is no constitutional limitation that would require federal or state courts to define specific jurisdiction narrowly according to particular legal theories supporting recovery. Rather, the Due Process Clauses in both the Fifth and Fourteenth Amendments support a broad interpretation of specific jurisdiction that would allow a federal or state court to adjudicate the entire constitutional case brought against a defendant.

I. INTRODUCTION

In 1984, the United States Supreme Court recognized two distinct types of personal jurisdiction: (1) general personal jurisdiction and (2) specific personal jurisdiction.[1] While the Court has consistently maintained the distinction between

---

* Professor of Law, Suffolk University Law School.; J.D., Boston College Law School, 1989; B.S., University of Delaware, 1986. I would like to thank my colleagues Rosanna Cavallaro, Joseph Glannon, and Susan Grover for generously offering their time and thoughtful comments on earlier drafts of this article. I would also like to thank Steven Torres, Jill Morrissey, Joseph Ranssier, and Anthony Dellorfano for their valuable research assistance.

[1] Specific jurisdiction confers "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum," and general jurisdiction confers "personal jurisdiction over a defendant in a suit *not* arising out of or related to the defendant's contacts with the forum." Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 nn.8

these two types of jurisdiction, together with the notion that specific personal jurisdiction confers narrower jurisdictional authority than general personal jurisdiction, the Court has never precisely defined the scope of specific personal jurisdiction. Rather, the Court has stated that specific jurisdiction authorizes a court to exercise jurisdiction over a defendant for a "suit"[2] or "litigation"[3] that arises out of the defendant's forum contacts. The Court's imprecision in this regard creates both theoretical and practical problems. Theoretically, the Court's failure to clearly define the scope of specific jurisdiction creates uncertainty regarding the characteristics that distinguish specific jurisdiction from general jurisdiction.[4] Practically, the Court's imprecision creates difficulty when, for example, a defendant is sued on multiple counts that all arise out of the same factual event and some of the counts satisfy the constitutional and statutory requirements for specific personal jurisdiction but other counts do not meet one or both of the requirements.

If the scope of specific jurisdiction is defined in terms of particular legal theories, a court's jurisdictional authority is limited to those counts against a defendant that independently satisfy the jurisdictional requirements. This jurisdictional authority, however, does not necessarily allow the court to adjudicate the entire factual dispute against the defendant. If the scope of specific jurisdiction is defined in terms of the factual event, however, the court's jurisdictional authority extends to all of the counts against the defendant arising out of the same nucleus of operative facts as the jurisdictionally sufficient counts, thus permitting the court to adjudicate the entire dispute against the defendant.

Courts that have interpreted the scope of specific jurisdiction broadly in terms of the nucleus of operative facts have relied upon the doctrine of pendent personal jurisdiction. This article explores the constitutional and statutory authority supporting the doctrine of pendent personal jurisdiction as an answer to the practical problem of determining how to treat jurisdictionally pendent counts. The article also suggests that the doctrine of pendent personal jurisdiction provides a lens through which we may evaluate the theoretical concern surrounding the

---

& 9 (1984) (emphasis added).

[2] *Id.* at n.8; McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("It is sufficient for purposes of due process that the *suit* was based on a contract which has a substantial connection with [the forum] state.") (emphasis added).

[3] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). The Court stated:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the *litigation* results from alleged injuries that 'arise out of or relate to' those activities.

Id. (emphasis added).

[4] While we know that specific jurisdiction confers narrower jurisdictional authority than general jurisdiction, it is impossible to determine how much narrower the jurisdictional authority is until we define the scope of specific jurisdiction.

scope of specific personal jurisdiction. The article concludes that if pendent personal jurisdiction is a permissible extension of specific personal jurisdiction, then the scope of specific jurisdiction must extend to the entire constitutional case brought against the defendant.[5]

II. THE PENDENT PERSONAL JURISDICTION PROBLEM

While millions are now familiar with Jonathan Harr's book, *A Civil Action*,[6] detailing the plight of a group of neighbors from the small, working-class town of Woburn, Massachusetts, who suffered grave consequences from contamination of their local water supply,[7] few people are aware of the many ripples that resulted from it. One such ripple was a lawsuit filed by John J. Riley, Jr. ("Riley") against Harr and his publishers, alleging that the book defamed him, portrayed him in a false light, and caused him emotional distress.[8] Riley filed his lawsuit in the New Hampshire Superior Court and the defendants removed the case to the United States District Court for the District of New Hampshire on the basis of diversity jurisdiction. Harr argued that the court lacked personal jurisdiction over him with regard to a slander claim arising out of comments Harr had made about Riley during an oral presentation in Newburyport, Massachusetts.[9] Harr additionally argued that he did not have sufficient deliberate contacts with New Hampshire that gave rise to, or related to, the slander count to support personal jurisdiction over him for this count.

If the slander count had been the sole count brought against Harr in New Hampshire, Harr's argument would have had considerable strength. Although the allegedly slanderous statements concerned the subject matter dealt with in the book and involved statements about Riley that were similar to defamatory statements included in the book, the allegedly slanderous statements were

---

[5] The Court originally used the term "constitutional case" to define the scope of federal subject matter jurisdiction under Article III of the Constitution. In *United Mine Workers v. Gibbs*, the Court stated that a constitutional case encompasses all legal theories for recovery that arise out of a "common nucleus of operative fact." 383 U.S. 715, 725 (1966).

[6] JONATHAN HARR, A CIVIL ACTION (Vintage Books 1996).

[7] *A Civil Action* spent more than one hundred weeks on the New York Times Best Seller List, became a motion picture, and received the National Book Critics Circle Award for Nonfiction. The book chronicled the Herculean efforts taken by one attorney to prove that the defendants, W.R. Grace & Co., Beatrice Foods Co., and the John J. Riley Company were responsible for pollution found in the Woburn municipal wells and the resulting deaths of five Woburn children from leukemia. *See* Riley v. Harr, No. 98-712-M, 2000 U.S. Dist. LEXIS 8596, at *3–*4 (D.N.H. Mar. 31, 2000).

[8] *Id.* at *11. Specifically, Riley alleged the following seven counts: (1) intentional infliction of emotional distress; (2) slander (against Harr only); (3) defamation; (4) invasion of privacy—public disclosure of private facts; (5) invasion of privacy—placing the plaintiff in a false light; (6) loss of consortium; and (7) a claim for enhanced compensatory damages. *Id.* at *2.

[9] *Id.* at *61–*63.

communicated by Harr while he was present in Massachusetts—not while he was in New Hampshire or pursuant to the circulation of the book in New Hampshire. Thus, if the slander count was the only count filed against Harr in New Hampshire, a court could have held that although Harr had established minimum contacts with New Hampshire when he circulated the book, those contacts were not closely enough related to the slander count to give rise to specific jurisdiction in the forum.

The slander count, however, was not the sole count filed against Harr in New Hampshire. Rather, it was joined with several other counts that arose out of the circulation of the book. None of the defendants objected to the assertion of personal jurisdiction with regard to the claims arising out of statements published in the book. Presumably, the defendants believed that a court would find not only that the defendant had minimum contacts with New Hampshire (because the allegedly defamatory statements were published in a book that circulated in the plaintiff's home state of New Hampshire), but also that it was foreseeable that the plaintiff would suffer injury from any wrongful statements in New Hampshire.[10]

In resolving Harr's motion, the court noted that "Harr's challenge to personal jurisdiction with respect to [the slander count] implicates the complex and unsettled doctrine of pendent personal jurisdiction. If the doctrine were applied here, it would not matter whether the court would otherwise have personal jurisdiction over Harr with respect to the slander claim, standing alone."[11] In other words, because specific personal jurisdiction existed over Harr with regard to the counts arising out of statements in the book, if the court applied the pendent personal jurisdiction doctrine, it could adjudicate the jurisdictionally insufficient counts arising out of the same nucleus of operative facts as the jurisdictionally sufficient counts.

Over fifty years ago, the United States Supreme Court adopted the minimum contacts doctrine in the now famous case of *International Shoe v. Washington*.[12] Since then, the Court has attempted to define and refine the nuances of the doctrine—sometimes with little success. Some of the key cases have addressed difficult issues, such as: the quantitative[13] and qualitative[14]

---

[10] *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984).

[11] *Riley*, 2000 U.S. Dist. LEXIS 8596, at *62–*63. It is possible to argue that the slander count against Harr did not arise out of the same operative facts as the counts arising out of the circulation of the book. This possibility raises another very interesting question: How should courts define the relevant set of operative facts to determine whether multiple counts arise out of the same constitutional case? While this question is certainly one that could, and should, be probed, it is not the subject of this article. Rather, this article addresses the larger question: when multiple counts arise out of the same operative facts, is specific personal jurisdiction broad enough to allow courts to adjudicate pendent counts?

[12] 326 U.S. 310 (1945).

[13] The quantity of contacts necessary to justify the exercise of jurisdiction depends upon the type of jurisdiction that is applied. In *McGee v. International Life Ins. Co.*, the Court held that a single contact may be sufficient to confer specific personal jurisdiction over a suit directly

requirements of establishing minimum contacts; whether a defendant creates a minimum contact with a forum by placing its product into the stream of commerce knowing the stream is likely to carry the product to that forum;[15] and whether the Due Process Clause of the Fourteenth Amendment acts as an instrument of interstate federalism.[16] Yet, notwithstanding the Court's willingness to address and attempt to resolve these difficult issues, the Court has given little or no attention to one basic question: what is the scope of specific personal jurisdiction?

Since the mid-1980s, the Court has recognized the distinction between general personal jurisdiction and specific personal jurisdiction. Specific jurisdiction confers a kind of "personal" jurisdiction over a defendant, but unlike general personal jurisdiction, specific jurisdiction does not extend to any claim that might be brought against that defendant. Rather, specific jurisdiction authorizes a court to exercise jurisdiction over a defendant only for a "suit" that

---

related to that contact. 355 U.S. 220 (1957). In *Helicopteros Nacionales de Colombia v. Hall*, on the other hand, the Court implied that a large quantity of contacts would be necessary to justify the exercise of general jurisdiction. 466 U.S. 408, 416–19 (1984) (rejecting the exercise of general jurisdiction where the defendant sent its chief executive officer to the forum for a contract negotiation session, accepted a check drawn on a forum bank, purchased a large quantity of goods and services in the forum for substantial sums, and sent personnel to the forum for training).

[14] In *International Shoe*, the Court stated that:

> [T]he criteria by which we mark the boundary line between those activities which justify the subjection of a [defendant] to suit, and those which do not, cannot be simply mechanical or quantitative.... Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure.

326 U.S. at 319. The Court refined this statement several years later when it stated that a defendant must purposefully reach out to the forum in order to create a minimum contact. The Court stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.... [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State....

Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[15] *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion) (rejecting the exercise of jurisdiction over a foreign defendant on the ground that such jurisdiction would be unfair to the defendant under the facts of the case).

[16] The Court has been inconsistent in its discussion of this issue. *Compare* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982) (stating that the Due Process Clause "is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns"), *with* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 294 (1980) (stating that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment").

arises out of the defendant's forum contacts.[17] But it is not clear whether "suit" refers to the legal theory that gives rise to each count or whether it instead refers to the factual event that gives rise to a number of factually related counts. For example, if a complaint is brought against a defendant for negligence and breach of contract, both of which arise out of the same factual event, are there two "suits" such that specific jurisdiction must be established over each count independently, or is there a single "suit" encompassing the factual event that gives rise to both counts?[18] This is a question, posed in *Riley v. Harr*,[19] that is appearing in federal litigation more and more frequently.

A court faced with the situation described in *Riley* has a number of choices. It may: (1) dismiss only the counts that are jurisdictionally insufficient and retain jurisdiction over the remaining aspects of the case; (2) dismiss the entire case on grounds that one aspect of it is jurisdictionally insufficient and that efficiency dictates that all of the counts should be tried together elsewhere; or (3) retain jurisdiction over all of the counts on the ground that the jurisdictional requirements are satisfied for one and all from a single claim that should be tried together. While the first alternative is clearly within a court's authority, splitting the dispute between forums raises issues concerning additional inconvenience, potential for inconsistent verdicts, and systemic inefficiency. The second alternative would be justifiable if the court concluded that the jurisdictionally sufficient claim should be dismissed under the doctrine of *forum non conveniens*[20] because the public and private interest factors weigh in favor of trying the related counts in one case.[21]

The third alternative is the most difficult to justify. This alternative would be justifiable only if the jurisdictionally insufficient count could "tag along" with one or more other counts that were jurisdictionally sufficient on the theory that they all formed a single "suit." If this premise is acceptable, a court may retain

---

[17] *Helicopteros*, 466 U.S. 408, 414 nn. 8 & 9 (1984).

[18] In an effort to avoid confusion of terminology, this article will refer to different legal theories for recovery as a "count." A "claim" will refer to the set of operative facts which give rise to an enforceable legal right.

[19] No. 98-712-M, 2000 U.S. Dist. LEXIS 8596, at *62–*63 (D.N.H. Mar. 31, 2000).

[20] Alternatively, the court could cure the jurisdictional deficiency by transferring the case pursuant to 28 U.S.C. § 1631 (1994) to a jurisdiction that would have a basis for jurisdiction over each of the counts independently, if such a jurisdiction exists.

[21] The first and second alternatives rely upon the traditional but narrow interpretation of the scope of specific jurisdiction that limits the court's jurisdictional authority to particular legal theories. Data Disc., Inc. v. Systems Tech. Assoc., 557 F.2d 1280, 1289 n.8 (9th Cir. 1977); United States v. Famous Artists Corp., No. 95-5240, 1996 U.S. Dist. LEXIS 3043, at *21 (E.D. Pa., March 14, 1996); Debreceni v. Bru-Jell Leasing Corp., 710 F. Supp. 15, 19 (D. Mass. 1989); Bus. Trends Analysts v. Freedonia Group, Inc., 650 F. Supp. 1452, 1455 (S.D.N.Y. 1987); Sun World Lines, Ltd., v. March Shipping Corp., 585 F. Supp. 580, 584–85 (E.D. Mich. 1984); Sterling Television Presentations, Inc. v. Shinton Co., Inc., 454 F. Supp. 183, 186 (S.D.N.Y. 1978).

jurisdiction over all of the counts—including those that fail to satisfy personal jurisdiction independently—if it determines that all arise out of the same factual scenario and that it would not be unfair to subject the defendant to personal jurisdiction over the entire constitutional case. This type of jurisdiction is most frequently referred to as "pendent personal jurisdiction."[22]

To date, the Supreme Court has not considered whether the scope of specific personal jurisdiction is broad enough to permit the exercise of pendent personal jurisdiction.[23] If the considerable level of attention that the issue has received in the federal courts is any indicator, the issue is poised to reach the Court in the near future. While discussion can be found in cases dating back to the mid-1950s, the doctrine has been cited with increasing frequency during the last decade.[24] The Second, Third, Fourth, Seventh, and the District of Columbia Circuits have considered and applied the doctrine.[25] Additionally, more than fifty decisions by

---

[22] Since the enactment of 28 U.S.C. § 1367 (1994), which confers supplemental subject matter jurisdiction, several scholars have employed the term "supplemental personal jurisdiction" to refer to the same concept that this article describes as pendent personal jurisdiction. While either label may be appropriate, this article employs the label "pendent personal jurisdiction" to avoid any implication that this doctrine derives from section 1367 itself. As currently written, § 1367 refers exclusively to subject matter jurisdiction. If Congress chooses to amend § 1367 to expressly confer personal jurisdiction over pendent legal theories, it would be appropriate to use the labels "supplemental personal jurisdiction" and "supplemental subject matter jurisdiction." But without such an amendment, I believe that "pendent personal jurisdiction" is the best label to avoid unnecessary confusion.

[23] In fact, the Court has given very little guidance on the scope of specific personal jurisdiction at all. Most scholars addressing the issue have done so in terms of defining the "nexus" requirement—that is, the relatedness of a defendant's contacts to the forum with the cause of action. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82 (1980) (suggesting that the defendant's forum contacts must form a substantively relevant fact that is part of a well-pleaded complaint in order to satisfy the nexus requirement); William Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1336–46 (1984) (suggesting that there is an inverse relationship between the quantity of forum contacts and the closeness of the relationship required between the cause of action and the contacts); *see also* Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559 (1998) (suggesting that the Constitution does not require a causal link between the defendant's forum contacts and the cause of action if the underlying purposes of specific jurisdiction are satisfied).

[24] Pendent personal jurisdiction has been cited in over seventy reported decisions, and approximately half of these citations have occurred after 1990.

[25] Each of these cases has involved personal jurisdiction over one count pursuant to a federal statute that confers nationwide service of process and pendent personal jurisdiction over factually related counts that did not satisfy the requirements for personal jurisdiction independently. Robinson Eng'g Co. v. George, 223 F.3d 445, 449–50 (7th Cir. 2000) (applying pendent personal jurisdiction to counts that were factually related to counts arising under the Securities Act and the Securities Exchange Act); ESAB Group v. Centricut, Inc., 126 F.3d 617, 628 (4th Cir. 1997) (applying pendent personal jurisdiction to related state law counts joined with RICO count, noting that "judicial economy and convenience of the parties is best

United States District Courts discuss pendent personal jurisdiction, the majority of which uphold the application of the doctrine.[26]

These cases demonstrate that federal courts are willing to treat specific personal jurisdiction as a source of jurisdiction strong enough to support their adjudication of pendent counts. A closer look at these cases also suggests that a hierarchy of specific personal jurisdiction is emerging. Federal courts are far more willing to adjudicate pendent counts where personal jurisdiction over the anchor count[27] is based upon a federal nationwide service of process provision[28] than where personal jurisdiction over the anchor count is based upon a state long-arm statute.[29]

This article considers the doctrine of pendent personal jurisdiction as a means of determining the scope of specific personal jurisdiction in federal court. Part III

---

facilitated by a consideration of all legal theories arising from a single set of operative facts") (quoting Sohns v. Dahl, 392 F. Supp. 1208, 1218 (W.D. Va. 1975)); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056–57 (2d Cir. 1993) (applying pendent personal jurisdiction to related state law counts joined with a count brought pursuant to ERISA's Multiemployer Pension Plan Amendments Act); Int'l Controls Corp. v. Vesco, 593 F.2d 166, 175 (2d Cir. 1979), *cert. denied, sub nom.* Vesco v. Int'l Controls Corp., 442 U.S. 941 (1979) (authorizing pendent personal jurisdiction over related state law counts joined with count brought pursuant to Securities and Exchange Act of 1934); Oetiker v. Jurid Werke, G.m.b.H., 556 F.2d 1, 4–5 (D.C. Cir. 1977) (applying pendent personal jurisdiction to related state law counts joined with patent count); Robinson v. Penn Cent. Co., 484 F.2d 553, 554–55 (3d Cir. 1973) (applying pendent personal jurisdiction to related state law count joined with federal securities count).

[26] Most of these cases have involved personal jurisdiction over one count pursuant to a federal statute permitting nationwide service of process and pendent personal jurisdiction over factually related pendent counts. *See infra* notes 64–71 and accompanying text. The application of pendent personal jurisdiction in federal cases that do not involve a nationwide service of process provision has been relatively rare. To date, the Second Circuit is the only appellate court that has extended the application of pendent personal jurisdiction in a situation that did not invoke a nationwide service of process provision. Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719 (2d Cir. 1980) (applying pendent personal jurisdiction in diversity case); *see also* Rice v. Nova Biomedical Corp., 38 F.3d 909, 913 (7th Cir. 1994) (noting in dicta apparent approval of district court's application of pendent personal jurisdiction in diversity case). Moreover, application of the doctrine in state court cannot be found in reported decisions.

[27] For purposes of this article, I refer to a count that independently satisfies the requirements for specific personal jurisdiction as an "anchor count." This term is used regardless of whether the basis for specific personal jurisdiction derives from a nationwide service of process provision or whether it derives from a traditional minimum contacts analysis.

[28] When personal jurisdiction over the anchor count is based upon a federal statute providing for nationwide service of process, the court need only determine that the exercise of personal jurisdiction is authorized by the statute and that it does not violate the Due Process Clause of the Fifth Amendment. *See infra* note 113 and accompanying text.

[29] When personal jurisdiction over the anchor count is based upon a state long-arm statute, the court must determine if the state statute permits the exercise of jurisdiction and if the exercise of jurisdiction is permitted by the Due Process Clause of the Fourteenth Amendment. *See infra* note 113.

sets out the two classes of cases in which the issue of pendent personal jurisdiction may arise in federal court, and Part IV sets forth the historical development of the doctrine in each of these classes of cases. Part V analyzes whether the exercise of pendent personal jurisdiction in either of these classes of cases violates the Due Process Clause of the Fifth Amendment. Concluding that the Fifth Amendment does not pose a barrier to the exercise of pendent personal jurisdiction in either class of cases, Part VI then considers whether there is statutory authority to exercise pendent personal jurisdiction pursuant to a nationwide service of process provision or pursuant to a state long-arm statute and the Fourteenth Amendment. I conclude by arguing that the present reluctance of courts to adjudicate claims pendent to non-nationwide service of process counts is unwarranted and that specific personal jurisdiction in both classes of cases is constitutionally strong enough to support the exercise of personal jurisdiction over an entire constitutional case.

III. TWO CONTEXTS IN WHICH PENDENT PERSONAL JURISDICTION MAY ARISE IN FEDERAL COURT

Pendent personal jurisdiction may arise in two different contexts in federal court: (1) cases that invoke a nationwide service of process provision and (2) traditional minimum contacts cases.[30] Because the cases that arise in these contexts involve different sources of jurisdiction over the anchor count, they require separate analysis.

A. *Federal Cases That Invoke a Nationwide Service of Process Provision*

The most common context in which pendent personal jurisdiction occurs is when a defendant is sued for multiple factually related counts, one or more of which alleges the violation of a federal statute providing for nationwide service of process. In this situation, the federal court will exercise personal jurisdiction over the anchor count pursuant to Federal Rule of Civil Procedure 4(k)(1)(D), which vests the federal court with authority to exercise personal jurisdiction whenever service of process is "authorized by a statute of the United States."[31] Thus, the court is permitted to exercise personal jurisdiction if such jurisdiction is permitted by a federal statute and does not violate the Due Process Clause of the Fifth

[30] For purposes of this discussion, traditional minimum contacts cases are those that rely upon a state long-arm provision and the Due Process Clause of the Fourteenth Amendment for the assertion of personal jurisdiction. The issue of pendent personal jurisdiction may also arise in cases filed in state court. While this article focuses on the implications of pendent personal jurisdiction in federal court, it should be noted that the analysis for traditional minimum contacts cases filed in federal court is virtually identical to the analysis that would be applied to a case filed in state court. *See infra* text accompanying notes 159–98.

[31] FED. R. CIV. P. 4(k)(1)(D).

Amendment.[32]

Frequently, a complaint is filed that alleges multiple counts arising out of the same operative facts. When some of the counts arise under a federal statute providing for nationwide service of process and others arise under state law or under federal law that does not specifically provide for service of process, a court must determine whether it is authorized to adjudicate the entire dispute. In the absence of pendent personal jurisdiction, a court must look to Federal Rule of Civil Procedure 4(k)(1)(A) to assert personal jurisdiction over the factually related counts that do not arise under the nationwide service provision. Rule 4(k)(1)(A) authorizes a federal court to exercise personal jurisdiction over a defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Thus, the court would have to determine if the applicable state long-arm statute would permit the assertion of personal jurisdiction over the related counts and whether the exercise of jurisdiction would violate the Fourteenth Amendment of the Constitution. If pendent personal jurisdiction is applied, the court may avoid the analysis under Rule 4(k)(1)(A) by holding that the jurisdictional authority conferred by the nationwide service of process provision extends to all counts that arise out of the same nucleus of operative fact as the anchor count.

This situation is illustrated in *ESAB Group, Inc. v. Centricut, Inc.*[33] In *ESAB*, the plaintiff brought suit alleging that a group of defendants engaged in a conspiracy to appropriate the plaintiff's trade secrets and customer lists.[34] The factual allegations supported six counts based upon state law and one count based on civil RICO.[35] The Fourth Circuit first considered whether personal jurisdiction could be established pursuant to the state long-arm statute and the Fourteenth

---

[32] As is set forth more fully below, the Fifth Amendment is the source of constitutional restraint on personal jurisdiction in this context, whereas the Fourteenth Amendment is the source of constitutional restraint on personal jurisdiction in the other two contexts where the basis for the court's assertion of jurisdiction is a state long-arm statute. *See infra* note 113 and accompanying text.

[33] 126 F.3d 617 (4th Cir. 1997).

[34] The plaintiff filed the complaint in its home state of South Carolina against two defendants from New Hampshire and one defendant from Florida. The complaint alleged that the New Hampshire defendants entered into a relationship with the Florida defendant by which the Florida defendant gave the plaintiff's trade secrets and customer lists to the New Hampshire defendants. All the relations between the defendants were carried out in and between New Hampshire and Florida. The defendants' only alleged contact with South Carolina involved the defendants knowing that their actions, if successful, would result in fewer sales to the plaintiff, headquartered in South Carolina. In essence, the complaint alleged that the defendants intended to gain a competitive advantage over the plaintiff by making sales that the plaintiff would have otherwise made. The customer list included companies located across the United States and Canada, with only one such company located in South Carolina. The evidence indicated that no sales in South Carolina were ever made by the defendants. *Id.* at 625.

[35] *Id.* at 621.

Amendment, as prescribed by Federal Rule of Civil Procedure 4(k)(1)(A).[36] Noting that the South Carolina long-arm statute has been interpreted to extend to the outer bounds permitted by due process,[37] the court considered whether the defendants had established minimum contacts with the forum such that the exercise of personal jurisdiction would not offend the Fourteenth Amendment. The court held that the exercise of jurisdiction would violate the Fourteenth Amendment because the defendants had not directed any conduct toward the forum state.[38] In reaching this conclusion, the court noted that "[a]lthough the place that the plaintiff feels the alleged injury is plainly relevant to the inquiry, it must ultimately be accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld."[39] Accordingly, the court held that personal jurisdiction could not be exercised pursuant to Rule 4(k)(1)(A).[40]

Notwithstanding the court's conclusion that the exercise of jurisdiction would violate the Fourteenth Amendment, the court held that personal jurisdiction did exist with regard to the civil RICO count.[41] Relying upon Rule 4(k)(1)(D), the court held that the defendants were validly served with process pursuant to RICO's nationwide service of process provision[42] and such exercise of jurisdiction did not violate the Due Process Clause of the Fifth Amendment.[43] The court then went on to apply pendent personal jurisdiction to the related state law counts, noting that "judicial economy and convenience of the parties is best facilitated by a consideration of all legal theories arising from a single set of operative facts."[44] The court reached this conclusion even though it concluded that the exercise of personal jurisdiction over the defendants for the state law counts, standing alone, would not have been permitted.

B. *Traditional Minimum Contacts Cases*

---

[36] *Id.* at 622.

[37] *Id.* at 623 (stating that "the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one") (quoting Stover v. O'Connell Assocs., Inc., 84 F.3d 132, 135–36 (4th Cir. 1996)).

[38] *ESAB Group*, 126 F.3d at 623.

[39] *Id.* at 626.

[40] *Id.*

[41] *Id.* at 628.

[42] 18 U.S.C. § 1965(d) (1994) (authorizing service of process "in any judicial district in which such person resides, is found, has an agent, or transacts his affairs").

[43] *ESAB Group*, 126 F.3d at 627 (finding no violation of the Fifth Amendment because there was no evidence of "such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing assertion of *in personam* jurisdiction").

[44] *Id.* at 628 (quoting Sohns v. Dahl, 392 F. Supp. 1208, 1218 (W.D. Va. 1975)). The court relied upon *United Mine Workers v. Gibbs*, in which the Supreme Court addressed the somewhat analogous situation arising in the context of subject matter jurisdiction. 383 U.S. 715 (1966).

The second context in which pendent personal jurisdiction may arise is in federal cases that do not rely upon a nationwide service of process provision. In these situations, the court will rely upon Federal Rule of Civil Procedure 4(k)(1)(A), which authorizes a federal court to exercise personal jurisdiction over a defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." As previously noted, invoking Rule 4(k)(1)(A) will require the federal court to consider whether the state court would have statutory authority to exercise jurisdiction and whether the exercise of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.[45] It is not uncommon for a complaint to allege multiple counts arising out of the same operative facts. If one or more of the counts are found to satisfy the state long-arm statute and the Fourteenth Amendment but other counts fail to satisfy either or both of these requirements, the court must consider whether it is authorized to adjudicate the entire dispute. In the absence of pendent personal jurisdiction, the court must dismiss the counts that fail to satisfy the state long-arm statute and/or the Fourteenth Amendment. If pendent personal jurisdiction is applied, the court may extend its jurisdictional authority to the jurisdictionally insufficient counts as long as they arise out of the same factual dispute that gives rise to the jurisdictionally sufficient counts.

This situation is illustrated in *Anderson v. Century Products Co.*[46] In *Anderson*, the plaintiff filed an eight-count complaint alleging that Century Products ("Century") stole a product idea that the plaintiff had offered to sell to the company.[47] Century filed a motion to dismiss the complaint for lack of personal jurisdiction. Applying Rule 4(k)(1)(A), the court noted that the relevant provision of the New Hampshire long-arm statute was coextensive with federal law, and the two requirements thus "collapse[d] into the 'minimum contacts'

---

[45] While these requirements are considered statutory requirements, they in fact subsume the relevant constitutional inquiry. Specifically, if the exercise of jurisdiction is permitted by the Due Process Clause of the Fourteenth Amendment, as would be required by Rule 4(k)(1)(A), it would necessarily be permitted by the Due Process Clause of the Fifth Amendment. *See supra* notes 114–22 and accompanying text.

[46] 943 F. Supp. 137 (D.N.H. 1996).

[47] The plaintiff, a resident of New Hampshire, invented an infant stroller which could also serve as a car seat. Anderson contacted Century in Ohio to determine if it would be interested in manufacturing and marketing the product. Century responded to Anderson's inquiry, invited him to submit further information describing his product, and requested that he execute the company's Idea Submission Policy form. Anderson sent Century the executed Idea Submission Policy form, drawings, and a written description of his invention. Shortly thereafter, Century sent a letter to Anderson in New Hampshire rejecting the product proposal. *Id.* at 140. When Anderson learned that Century had begun manufacturing and marketing an infant stroller substantially similar to his invention, he filed a complaint in the United States District Court of New Hampshire alleging breach of contract, unjust enrichment, fraud, breach of fiduciary duty, misappropriation of confidential information, conversion, violation of New Hampshire's Uniform Trade Secret Act, and violation of New Hampshire's Consumer Protection Laws. *Id.*

analysis."[48] Focusing on the requirements imposed by the Due Process Clause of the Fourteenth Amendment, the court held that while Century mailed its Idea Submission Form to Anderson in New Hampshire and minimally corresponded with him in New Hampshire, this was not sufficient to conclude that Century satisfied the "purposeful availment" requirement of the Due Process Clause.[49] The court considered the communications and transactions between the parties and found that Century's contacts with New Hampshire were not sufficient to find that it had made a decision to interject itself into the New Hampshire market.[50]

With regard to the tort claims, however, the court did not limit its analysis to the defendant's in-state contacts. Rather, the court noted that when a defendant, "through out of state conduct, intentionally causes a tortious injury in the forum, jurisdiction will lie for claims arising from that injury."[51] The court held that the situs of the tortious injury was New Hampshire; thus, the exercise of personal jurisdiction with regard to the tort claims would not offend the Fourteenth Amendment.[52] Thus, the court concluded that the defendant's contacts with New Hampshire were sufficient under both the state long-arm statute and the Constitution to confer jurisdiction over it with respect to the tort counts but not with respect to the contract counts.[53]

In an effort to avoid splitting up the suit, the *Anderson* court relied upon the doctrine of pendent personal jurisdiction to justify retaining jurisdiction over all of the counts.[54] In reaching this conclusion, the court noted that "[i]t should not

---

[48] *Id.* at 141.

[49] *Id.* at 143; *see* Whitaker Corp. v. United Aircraft Corp., 482 F.2d 1079, 1083–85 (1st Cir. 1973).

[50] *Anderson*, 943 F. Supp. at 143.

[51] *Id.*

[52] *Id.* at 144.

[53] *Id.* at 142–45. The court offered the following justification for its conclusion:

> [I]t is necessary to examine why the fact that New Hampshire felt the 'effects' of defendant's conduct is dispositive of the jurisdiction issue for the tort claim and not the contract claim, even though both arise from the same harmful effects; namely, the uncompensated loss of proprietary rights in the plaintiff's idea. The most apparent difference, and the one that has constitutional significance between the two causes of action, is the source of the rights at issue. With respect to torts, the state creates the rights, whereas the parties themselves are the source of contractual rights. When the state defines rights against tortious conduct, it is publicly proclaiming its will to deter that specific conduct, and when ignored by individuals engaging in proscribed conduct, the state has a heightened interest in judicially redressing any injurious effects felt within its borders. As the Supreme Court has noted: 'A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory.'

Id. at 146 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984)).

[54] *Anderson*, 943 F. Supp. at 147. Pendent personal jurisdiction is used to acquire personal jurisdiction over a count that is otherwise jurisdictionally insufficient but is joined with, and arises out of, the same factual scenario as a jurisdictionally sufficient count against the defendant.

matter for jurisdictional purposes whether the plaintiff chooses to characterize the conduct as a breach of contract or tortious or both."[55] Again, the court reached this conclusion notwithstanding the fact that it believed that the exercise of personal jurisdiction over the defendant for the contract count, standing alone, would not be permitted.

IV. HISTORICAL DEVELOPMENT OF PENDENT PERSONAL JURISDICTION IN FEDERAL COURT

A. *Nationwide Service of Process Cases*

The doctrine of pendent personal jurisdiction had its origin in federal question cases involving a claim arising under a federal statute providing for nationwide service of process.[56] Such counts were joined with one or more other counts arising out of the same factual scenario but for which there was no independent basis to exercise personal jurisdiction over the defendant. Analogizing to what is today referred to as "supplemental jurisdiction," courts held that the factual overlap between the jurisdictionally sufficient count(s) and the jurisdictionally insufficient count(s) justified the exercise of personal jurisdiction over all of the counts arising out of the common core of operative facts.

The first reported cases to raise the issue of pendent personal jurisdiction date back to the late 1940s and early 1950s.[57] Judges did not immediately embrace the notion of pendent personal jurisdiction, frequently rejecting the doctrine because Congress had not expressly provided for it in the statute that conferred jurisdiction over the anchor claim[58] or because it appeared to impose too great a hardship

---

[55] *Id.*

[56] Examples of federal statutes that provide nationwide service of process include: the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1994); the Investment Company Act of 1940, 15 U.S.C. § 80a-43 (1994); Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1965(b) (1994); the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1451(d) (1994); and patent statutes, see, for example, 35 U.S.C. § 293 (1994).

[57] *See* James S. Cochran, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 TEX. L. REV. 1463, 1468 n.22 (1986) (citing Schwartz v. Bowman, 156 F. Supp. 361 (S.D.N.Y. 1957) as one of the first cases to consider the merits of the doctrine and listing other cases in which the issue had been raised but not addressed directly, such as Errion v. Connell, 236 F.2d 447 (9th Cir. 1956) and Stella v. Kaiser, 82 F. Supp. 301, 304, 312 (S.D.N.Y. 1948)).

[58] There are several other early cases rejecting the application of pendent personal jurisdiction. *See, e.g.*, Trussel v. United Underwriters, Ltd., 236 F. Supp. 801 (D. Colo. 1964) (refusing to apply pendent personal jurisdiction to state law claims joined with federal securities claim), *aff'd sub nom.* Crist v. United Underwriters, Ltd., 343 F.2d 902 (10th Cir. 1965); Wilensky v. Standard Beryllium Corp., 228 F. Supp. 703 (D. Mass. 1964) (rejecting extraterritorial service of process over pendent claims because Congress did not clearly express its authorization of such process); Phillips v. Murchison, 194 F. Supp. 620 (S.D.N.Y. 1961)

upon defendants.[59] By the mid- to late-1960s, several federal district courts were persuaded by notions of judicial economy and convenience to accept and apply pendent personal jurisdiction in cases involving nationwide service of process provisions.[60] Few, if any, of these courts expressly considered whether this extension of judicial power exceeded their statutory or constitutional authority.[61]

The Third Circuit was the first federal circuit court of appeals to expressly uphold the application of pendent personal jurisdiction. In *Robinson v. Penn Central Co.*, the Third Circuit analyzed whether nationwide service of process provisions in the Securities Act of 1933 and the Securities Exchange Act of 1934 could provide a basis for pendent personal jurisdiction over factually related state law claims.[62] In *Robinson*, the defendant did not contest whether extraterritorial service could be made upon him under the federal statutes, and he did not contest whether the state law claims were factually related to the federal claims. Rather,

---

(refusing to apply "ancillary service" over libel claim that was joined with federal securities claim because it was not permitted by Congress in statute); Kappus v. Western Hills Oil, Inc., 24 F.R.D. 123 (E.D. Wis. 1959) (refusing to apply pendent personal jurisdiction over state law claims joined with federal securities claim because Congress did not provide for such jurisdiction in the statute); Lasch v. Antkies, 161 F. Supp. 851, 852 (E.D. Pa. 1958) (refusing to apply "ancillary" personal jurisdiction over state law claim joined with federal securities claim because Congress did not expressly provide for such jurisdiction in the Securities Act of 1933).

[59] *See* Schwartz v. Eaton, 264 F.2d 195 (2d Cir. 1959) (refusing to apply pendent personal jurisdiction on grounds of undue hardship where defendants argued that they were merely nominal defendants with no interest in the outcome of the federal claim but sought to be charged with damages on the pendent claims).

Some criticized the doctrine because it presented an opportunity for abuse by encouraging plaintiffs to allege violations of federal law they otherwise would not allege. *Id.* at 198–99 (Moore, J., concurring). In fact, this would not seem to pose a large problem because if the federal question claim were dismissed as insubstantial, the pendent claim would be dismissed as well.

[60] *See* Puma v. Marriott, 294 F. Supp. 1116, 1121 (D. Del. 1969); Sprayregen v. Livingston Oil Co., 295 F. Supp. 1376 (S.D.N.Y. 1968) (deeming extraterritorial service of process pursuant to section 27 of the Securities and Exchange Act of 1934 sufficient to confer pendent personal jurisdiction over related state claims); Kane v. Cent. Am. Mining & Oil, Inc., 235 F. Supp. 559, 568 (S.D.N.Y. 1964) (claiming that "the better view appears to be that considerations of judicial economy and convenience of the parties which underlie the pendant jurisdiction doctrine require that extraterritorial service also be sustained as to the nonfederal pendant claims"); Cooper v. N. Jersey Trust Co., 226 F. Supp. 972, 980–81 (S.D.N.Y. 1964) (stating that "reasons of judicial economy—which justify the judicially created doctrine of pendent jurisdiction—suggest sustaining the service of process as to the pendent non-federal claims"); Townsend Corp. of Am. v. Davidson, 222 F. Supp. 1, 4 (D.N.J. 1963).

[61] *See Sprayregen*, 295 F. Supp. at 1378–79 (citing convenience and judicial economy as justification for applying pendent personal jurisdiction and failing to mention constitutionality); *see also Kane*, 235 F. Supp. at 568 (citing convenience and judicial economy as justification for applying pendent personal jurisdiction and failing to mention constitutionality); *Cooper*, 226 F. Supp. at 980.

[62] 484 F.2d 553 (3d Cir. 1973).

the defendant focused on whether the congressional statute authorized the federal court to exercise personal jurisdiction over the defendant on the pendent counts. The court viewed the issue as one primarily of statutory interpretation rather than constitutional limitation and held that:

> [Pendent personal jurisdiction] is merely an aspect of the basic pendent jurisdiction problem. . . . Justification for entertaining such [pendent] claims 'lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims.'[63]

Several years after the Third Circuit decided the *Robinson* case, the Second Circuit also applied pendent personal jurisdiction in a federal securities action, expressing little or no constitutional concern about the doctrine.[64]

While several of the early pendent personal jurisdiction cases dealt with federal securities litigation, courts have applied the doctrine to claims arising out of other federal statutes providing for extraterritorial service of process. In *Oetiker*

---

[63] *Id.* at 555–56 (citations omitted).

[64] Int'l Controls Corp. v. Vesco, 593 F.2d 166, 175 n.5 (2d Cir. 1979), *cert denied*, 442 U.S. 941 (1979) (applying pendent personal jurisdiction to common law claims factually linked to claims under the Securities Exchange Act of 1934).

The United States District Courts have also been receptive to the application of pendent personal jurisdiction over common law counts that are factually linked to federal securities actions. *See, e.g.*, Mates v. N. Am. Vaccine, Inc., 53 F. Supp. 2d 814, 821 (D. Md. 1999) (finding that pendent personal jurisdiction existed over state common law claim that arose out of the same factual scenario as federal securities claim); FS Photo v. Picturevision, Inc., 48 F. Supp. 2d 442, 445 (D. Del. 1999) (upholding exercise of pendent personal jurisdiction over state claims and noting that "[a]lmost all of the courts that have considered the issue since 1970 have upheld pendent personal jurisdiction in cases arising under the Securities Act of 1933"); Nazareth Nat'l Bank & Trust v. E.A. Int'l Trust, No. CIV.A.90-1380-T, 1999 WL 549036, at *3 (W.D. Pa. July 26, 1999) (stating that "[i]f plaintiff has asserted a cognizable rule 10b-5 claim, the court may also exercise pendent personal jurisdiction on a national-contacts theory as to plaintiff's state-law claims"); Clapsaddle v. Telscape Int'l, Inc., 50 F. Supp. 2d 1086, 1090 (D.N.M. 1998) (holding that the court had pendent personal jurisdiction over state-law claims that share common facts with 10b-5 claims); Newman v. Comprehensive Care Corp., 794 F. Supp. 1513, 1520 (D. Or. 1992) (finding that if a court has personal jurisdiction over a federal securities claim, it may exercise personal jurisdiction over related state law claims); Clute v. Davenport Co., 584 F. Supp. 1562, 1581 (D. Conn. 1984) (upholding pendent personal jurisdiction over state securities claims that were factually related to federal securities claims); S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1123 (D. Mass. 1978) (upholding pendent personal jurisdiction over state law securities claims); Getter v. R.G. Dickinson & Co., 366 F. Supp. 559, 567 (S.D. Iowa 1973) (stating that "the better rule of law is that pendent personal jurisdiction should be allowed in a case where pendent subject matter jurisdiction is justified"); Altman v. Deramus, 342 F. Supp. 72, 75 (S.D.N.Y. 1972) (upholding pendent personal jurisdiction over a state claim that arose from the same factual scenario as the federal securities claim).

v. Werke,[65] the D.C. Circuit Court held that 35 U.S.C. § 293, which provides for extraterritorial service of process in patent suits, "enabled plaintiff to obtain personal jurisdiction over the defendant with respect to any of his claims that arose out of the same core of operative fact as those claims which clearly fell within the scope of § 293."[66] In reaching this conclusion, the court undertook no express constitutional analysis of pendent personal jurisdiction but rather loosely analogized the application of pendent personal jurisdiction to the application of pendent subject matter jurisdiction.[67] More recently, in *IUE AFL-CIO Pension Fund v. Herrmann*,[68] the Second Circuit upheld personal jurisdiction over an ERISA pension plan's claim under the Multiemployer Pension Plan Amendments Act (MPPAA) and applied pendent personal jurisdiction to state law claims that arose out of the same nucleus of operative fact as the federal claim.[69]

In 1997, the Fourth Circuit applied pendent personal jurisdiction to state law counts joined with a RICO count in *ESAB Group, Inc. v. Centricut, Inc.*,[70] noting that:

> Our recognition of pendent personal jurisdiction should present no constitutional objection any more serious than did pendent jurisdiction involving the court's subject matter jurisdiction. Once a court has a constitutional case, in the Article III sense, properly before it, service by a court sufficient to assert personal jurisdiction over a defendant by any authorized mechanism consistent with due process may be held to apply to the entire constitutional case.[71]

---

[65] 556 F.2d 1 (1977).

[66] *Id.* at 4.

[67] *Id.* (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).

[68] 9 F.3d 1049 (2d Cir. 1993).

[69] *Id.* at 1056–57. Other courts have applied pendent personal jurisdiction in ERISA cases. *See, e.g.*, AlliedSignal Inc. v. Blue Cross of California, 924 F. Supp. 34 (D.N.J. 1996); US Telecom v. Hubert, 678 F. Supp. 1500 (D. Kan. 1987); Fulk v. Bagley, 88 F.R.D. 153 (M.D.N.C. 1980). *But see, e.g.*, Connors v. Marontha Coal Co., 670 F. Supp. 45 (D.D.C. 1987) (declining to apply pendent personal jurisdiction in an ERISA case); Smith v. Montgomery Ward & Co., 567 F. Supp. 1331 (D. Colo. 1983) (refusing to apply pendent personal jurisdiction in ERISA case).

[70] 126 F.3d 617 (4th Cir. 1997).

[71] *Id.* at 628–29. Other federal courts have applied pendent personal jurisdiction in RICO suits. *See, e.g.*, Sadighi v. Daghighfekr, 36 F. Supp. 2d 267 (D.S.C. 1999); Arkansas Blue Cross and Blue Shield v. Philip Morris, Inc., No. 98-C2612, 1999 U.S. Dist. LEXIS 4798, at *498 (N.D. Ill. Mar. 31, 1999); Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 796 (N.D. Ohio 1998); Starlight Int'l. v. Herlihy, 13 F. Supp. 2d 1178 (D. Kan. 1998); Sullivan v. Rilling, No. 94C539, 1996 WL 650397 (N.D. Ill. Nov. 6, 1996); Berg-Mfg. v. Ivy/Mar Co., Inc., No. 94C539, 1996 WL 596512 (N.D. Ill. Oct. 15, 1996); Caterpillar v. Jerryco Footwear, 880 F. Supp. 578 (C.D. Ill. 1994); Mulhern v. W. Coast Video, Enter., Nos. 90C0417, 91C0711, 1992 WL 141990 (N.D. Ill. June 15, 1992); Bank of Crete v. Koskotas, No. 88 Civ. 8412 (KMW), 1991 WL 177287 (S.D.N.Y. Aug. 30, 1991); Merchants Nat'l Bank of Topeka v. Safrabank, No. 90-4194-R, 1991 WL 173781 (D. Kan. Aug. 28, 1991).

These cases illustrate that during the last decade, the doctrine of pendent personal jurisdiction has received considerable acceptance in suits where multiple counts share a common nucleus of operative fact and at least one of the counts invokes a federal statute authorizing nationwide service of process.

B. *Traditional Minimum Contacts Cases*

In traditional minimum contacts cases, Federal Rule of Civil Procedure 4(k)(1)(A) provides the statutory source of personal jurisdiction. Pursuant to this rule, personal jurisdiction will exist if the exercise of jurisdiction (1) comports with the long-arm statute of the state in which the federal court sits and (2) does not violate the Due Process Clause of the Fourteenth Amendment.[72]

To date, the Second Circuit is the only federal circuit court that has applied pendent personal jurisdiction in a diversity case. In *Hargrave v. Oki Nursery, Inc.*,[73] the Second Circuit applied pendent personal jurisdiction in a diversity case where the plaintiff asserted six claims based on the same nucleus of facts.[74] The court summarily concluded that the exercise of subject matter jurisdiction and personal jurisdiction over all of these counts did not pose a constitutional issue.[75] Turning to the long-arm restrictions, the court held that the allegations in the complaint regarding fraud satisfied the requirements of the New York long-arm statute, and thus, there was no question that the defendant was properly before the court on at least one count.[76] The court then turned its attention to whether the long-arm statute permitted the plaintiff to assert additional legal theories that arose out of the same basic facts as the count on which service was based.[77]

In answering this question, the court first looked to Federal Rule of Civil Procedure 4. Recognizing that Rule 4 does not expressly describe the reach of a federal court's personal jurisdiction with regard to pendent legal theories, the court considered whether Congress could confer such jurisdiction and, if so, whether Rule 4 was intended to confer such jurisdiction in this situation.[78] The court reasoned that Congress has the power to grant the district courts subject matter jurisdiction over entire controversies arising out of a common nucleus of operative fact.[79] By analogy, the court extended this reasoning to find that

---

[72] Of course, the exercise of jurisdiction must also comport with state constitutional requirements and the Due Process Clause of the Fifth Amendment.

[73] 646 F.2d 716 (2d Cir. 1980).

[74] *Id.* at 718. The plaintiff alleged fraud, breach of contract, breach of express warranty, breach of implied warranty of merchantability, breach of warranty of fitness, and negligence.

[75] *Id.*

[76] *Id.* at 719.

[77] *Id.* at 719–20.

[78] *Id.* at 719.

[79] Where multiple theories derive from a common nucleus of operative facts such that it would be logical and efficient to try them together in one judicial proceeding, they are considered "one 'case' within the meaning of Article III, Section 2 of the United States

Congress could also confer personal jurisdiction over entire controversies. Next, the court considered whether Rule 4 was intended to confer personal jurisdiction over entire controversies. Noting that the word "actions" is commonly used to refer to entire controversies, not just singular legal theories,[80] the court cited numerous statutes in which Congress conferred subject matter jurisdiction over "actions."[81] Relying upon these subject matter jurisdiction statutes as evidence of Congress' intent to permit the district courts to entertain power over entire controversies, and citing policy considerations concerning efficiency, the court held that pendent personal jurisdiction should extend to all claims arising out of the same nucleus of operative fact.[82] Thus, the court held that pendent personal jurisdiction could be exercised over all of the factually related counts in the complaint, even though a New York state court would likely have held that the long-arm statute did not confer jurisdiction over the pendent claims.[83]

Several points of interest arise from the *Hargrave* case. First, since the court concluded that the assertion of jurisdiction over any of the counts would not violate the Constitution, the court limited the reach of its holding to whether there was statutory authority to assert jurisdiction in the case. We do not know if the court would have reached a different conclusion if it felt that the exercise of jurisdiction over the pendent counts would have violated the Constitution. Additionally, it is interesting to note that the Second Circuit did not feel compelled to mimic what a New York state court would have held under its own long-arm statute. This is true even though the court was relying upon Rule 4(k)(1)(A), which explicitly refers to the jurisdictional limits of a state court of general jurisdiction.

Other courts have employed pendent personal jurisdiction where state law imposed limitations on the court's ability to exercise jurisdiction over the entire controversy.[84] For example, in *Rice v. Nova Biomedical Corp.*,[85] the plaintiff filed

---

Constitution." *Id.*

[80] "The word 'action' has been commonly understood to denote not merely a 'claim' or 'cause of action' but 'the entire controversy,' and is so used in the Federal Rules of Civil Procedure." *Id.*

[81] Congress has granted subject matter jurisdiction over "actions" between citizens of different states (28 U.S.C. § 1332 (1994)), "actions" arising under federal law (28 U.S.C. § 1331 (1994)), "actions" arising under the anti-trust laws (28 U.S.C. § 1337 (1994)), actions arising under the patents, copyright or trademark laws (28 U.S.C. § 1338 (1994)), "actions" under the civil rights legislation (28 U.S.C. § 1343 (1994)), "actions" under the Securities Exchange Act (15 U.S.C. § 78aa (1994)), or "actions" under the Labor Management Reporting and Disclosure Act (29 U.S.C. § 412 (1994)).

[82] *Hargrave*, 646 F.2d at 720–21.

[83] *Id.* at 718–19 (citing Fantis Foods, Inc. v. Standard Importing Co., 49 N.Y.2d 317, 324 (1980), in which the New York Court of Appeals held that the long-arm statute conferred personal jurisdiction over a tort count but not a breach of contract count, even though they both arose out of the same facts).

[84] *See* Behlke v. Metalmeccanica Plast, S.P.A., 365 F. Supp. 272, 277 (E.D. Mich. 1973)

a complaint against his former employer and supervisor. In counts one and two of the complaint, the plaintiff alleged that both defendants were liable for retaliatory discharge and defamation. In count three, the plaintiff alleged that his former supervisor was liable for intentionally interfering with the plaintiff's employment relationship.[86] The supervisor moved to dismiss all three counts against him for lack of personal jurisdiction on the ground that the state law fiduciary shield doctrine insulated him from personal jurisdiction in Illinois.[87] The court held that the fiduciary shield doctrine protected the supervisor from personal jurisdiction in Illinois on counts one and two of the complaint but the fiduciary shield doctrine did not apply with regard to count three.[88] Finding that the allegations in count three satisfied the Illinois long-arm statute and the minimum contacts doctrine, the court held that personal jurisdiction existed over the defendant with regard to this count.[89] The court then went on to hold that pendent personal jurisdiction allowed the court to exercise jurisdiction over counts one and two, notwithstanding the fiduciary shield doctrine:

> Since the first two counts are substantially interrelated to Count III and [the defendant] is already properly before us on Count III, from the standpoint of fundamental fairness as to contacts with and convenience of the forum, [the defendant] loses nothing by being subject to our judgment on the other two counts.[90]

The court made no express analysis of whether Illinois law intended to make an

---

(holding that two of the plaintiff's three claims satisfied the long-arm statute, but the third claim did not. Rather than dismiss the third claim, the court exercised pendent personal jurisdiction with the following rationale:

> Two theories for recovery, negligence and implied warranty, can stand independently before the court as the basis for the exercise of power over the defendant Metalmeccanica. The third theory for recovery, express warranty, would fail standing alone as the basis for the exercise of jurisdiction over the defendant Metalmeccanica. The theories are not separate causes of action. They are but "different epithets to characterize the same group of circumstances" and they "comprise one . . . case." The damage claimed as to each theory is the same. The plaintiff would not be permitted to sue separately on each theory. Thus it seems not unreasonable in this case to hold that since the court already had Metalmeccanica before it for two parts of the same cause of action, it should assume power over the defendant as to the third theory on the basis of the need to provide a reasonable forum for the economical and expeditious trial of a single claim).

Id.

[85] 763 F. Supp. 961 (N.D. Ill. 1991), *aff'd on other grounds*, 38 F.3d 909 (7th Cir. 1994).

[86] *Id.* at 963.

[87] *Id.* at 962.

[88] *Id.* at 965 (rejecting fiduciary shield with regard to count three because the complaint alleged the supervisor acted in furtherance of his own goals, not the goals of the company).

[89] *Id.* at 965–66.

[90] *Id.* at 966.

exception to the fiduciary shield doctrine when a defendant was otherwise properly subject to personal jurisdiction on a factually related claim.

Some courts have used pendent personal jurisdiction to avoid difficult Fourteenth Amendment Due Process issues surrounding the exercise of personal jurisdiction over pendent legal theories.[91] For example, in *Salpoglou v. Widder*,[92] a court employed pendent personal jurisdiction where a breach of contract count easily satisfied the minimum contacts test and the state long-arm provision, but a related tort count posed some difficulties. In that case, the plaintiff, a Massachusetts citizen, went to a Virginia doctor for cosmetic surgery after reading an advertisement in a Washington newspaper that she purchased in Massachusetts. After two failed surgeries in Virginia, the plaintiff asked the doctor to compensate her for his mistakes by paying for another doctor to perform a third operation. The third operation occurred in Massachusetts, and after several telephone calls between the plaintiff in Massachusetts and the defendant in Virginia, the doctor allegedly reneged on his agreement. The plaintiff subsequently filed suit in federal court in Massachusetts alleging malpractice and breach of contract.[93]

The *Salpoglou* court held that the defendant was subject to personal jurisdiction. First, the court held that the breach of contract claim arose directly from the defendant's purposeful forum activities because the contract was entered into and breached during telephone calls to the plaintiff in Massachusetts from the doctor's agents in Virginia. The court then cited other contacts with the forum,

---

[91] In *Home Owners Funding Corp. of Am. v. Century Bank*, the court avoided a Fourteenth Amendment Due Process analysis over two contract counts, noting that:

> Because the Court finds that it has personal jurisdiction over the defendant Century in this case with respect to the counts of negligent misrepresentation and 93A, and that therefore it has personal jurisdiction over Century with respect to the other three counts . . . it need not and does not decide at this time whether it otherwise has jurisdiction over Century with respect to the two contract counts in the complaint under the contract-plus analysis.

695 F. Supp. 1343, 1346 (D. Mass. 1988).

Similarly, in *National "Write Your Own Congressman" Club v. Jackson*, the court avoided determining whether a breach of contract claim satisfied the requirements of due process pursuant to the Fourteenth Amendment, noting that "[b]ecause the court possesses jurisdiction over Jackson with respect to National's tort claims, it also has personal jurisdiction over Jackson with respect to National's breach of contract claim." No. 3:96-CV-1288D, 1996 U.S. Dist. LEXIS 20806, at *8–*9 (D. Tex. Dec. 4, 1996). In *Nelson v. R. Greenspan & Co., Inc.*, the court avoided the Fourteenth Amendment analysis as well as the long-arm analysis surrounding the exercise of jurisdiction over a pendent breach of contract claim, noting only that "plaintiff's breach of contract claim is based on the same core of operative facts as the fraud claim and requiring plaintiff to bring the contract claim in another forum would result in unnecessary duplicative litigation and waste of judicial resources." 613 F. Supp. 342, 346 (E.D. Mo. 1985).

[92] 899 F. Supp. 835 (D. Mass. 1995).

[93] *Id.* at 836–38.

including the fact that the defendant held himself out as a plastic surgeon licensed in Massachusetts, that he advertised in a Washington paper that had a limited circulation in Massachusetts, and that he authorized the plaintiff to have some preliminary testing performed in Massachusetts prior to the surgeries in Virginia.[94] Finally, the court reasoned that because the defendant was subject to the court's jurisdiction with regard to the breach of contract claim, "his appearance on the malpractice claim [would] not impose a significant burden, and litigating both claims simultaneously [would] further economy both for the litigants and the court."[95] Thus, the court held that the Massachusetts long-arm statute and the Due Process Clause were satisfied and the exercise of personal jurisdiction over both counts was permissible.[96]

If the court had not resorted to pendent personal jurisdiction in this case, the malpractice claim likely would not have independently satisfied the due process requirements for the exercise of personal jurisdiction. First, while there is a direct causal link between the phone calls placed to the plaintiff in Massachusetts and the breach of contract claim, these calls occurred after the alleged event giving rise to the malpractice claim was over. Thus, if the minimum contacts test requires a causal link between the purposeful contacts and the cause of action, there would be no such link between the phone calls and the tort.[97] Second, the remaining contacts—holding himself out as a physician licensed in Massachusetts, advertising in a Washington newspaper that was sold in Massachusetts,[98] and assenting to the plaintiff's request to have preliminary blood work done in Massachusetts—provide a tenuous basis for the assertion of jurisdiction in Massachusetts for surgery that occurred in Virginia.

Arguably, none of these contacts show that the defendant purposefully reached out to Massachusetts in an attempt to induce Massachusetts citizens to come to Virginia for his services. Moreover, even if these contacts are considered "purposeful availment" of Massachusetts, it is dubious whether they would satisfy the nexus requirement. The court avoided these difficulties by employing pendent personal jurisdiction to the tort claim and concluding that it made sense to try the claims together.[99] While this result is economical, it is only justifiable if the doctrine of pendent personal jurisdiction is permissible—a question the court has

---

[94] *Id.* at 838–39.

[95] *Id.* at 838.

[96] *Id.* at 839.

[97] The Supreme Court has never specified what type of relationship is necessary to satisfy the nexus requirement.

[98] After the plaintiff first saw the defendant's advertisement in Massachusetts, she moved to Maryland and saw a second advertisement by the defendant. After seeing the second advertisement, she contacted the defendant to inquire about his services. *Salpoglou*, 899 F. Supp. at 836.

[99] *Id.* at 838. The conclusion that the tort and contract claims arise out of the same nucleus of operative fact for purposes of pendent personal jurisdiction is also questionable, given that the two claims occurred at different times and in different locations.

never directly analyzed.

Not all courts that have considered pendent personal jurisdiction have adopted the doctrine. The court considered pendent personal jurisdiction and rejected its application in the recent case of *Figawi, Inc. v. Horan*.[100] In *Figawi*, the plaintiff filed a seven-count complaint contesting the defendant's use of a commercial logo.[101] The court found that the plaintiff had successfully made a *prima facie* case that the fraud counts satisfied the relevant long-arm statute and the requirements of the Fourteenth Amendment Due Process Clause.[102] The court went on to find, however, that the plaintiff failed to make a *prima facie* showing that the counts alleging unfair competition, dilution, and trademark infringement satisfied the long-arm statute.[103] In light of its conclusion that only some of the counts were jurisdictionally sufficient, the court held that the most appropriate result was to limit the proceedings to issues that were material to the fraud counts. The court dismissed the jurisdictionally insufficient counts.[104] In reaching this conclusion, the court cited and rejected the reasoning of several cases that applied the doctrine of pendent personal jurisdiction.[105] Specifically, the court stated that pendent personal jurisdiction is not analogous to supplemental subject matter jurisdiction because the two doctrines arise out of different constitutional clauses.[106] Moreover, the court noted that "tendencies toward an expansive concept of pendent jurisdiction—even pendent subject matter jurisdiction—have been questioned and in some instances curbed, in more recent precedents that move toward an increasingly claim-based and claim-specific explanation of the scope and limits of jurisdiction of federal trial courts."[107]

Other courts have implicitly rejected the policy of pendent personal jurisdiction. For example, in *Milford Power Limited Partnership v. New England Power Co.*,[108] the plaintiff filed a multi-count complaint alleging that the defendant, New England Power (NEP), had breached an agreement to purchase energy.[109] The defendant responded by filing a counterclaim against the plaintiff

---

[100] 16 F. Supp. 2d. 74 (D. Mass. 1998).

[101] The seven counts in the complaint alleged: (1) unfair competition under the Lanham Act; (2) the use of the logo would create consumer confusion under the Lanham Act; (3) dilution of value of the logo; (4) trademark infringement under Massachusetts common law; (5) common law unfair competition; (6) violation of Massachusetts General Laws ch. 93A; and (7) fraud. *Figawi*, 16 F. Supp. 2d. at 79.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 83.

[105] *Id.* at 77–78.

[106] *Id.* at 77.

[107] *Id.* at 77–78.

[108] 918 F. Supp. 471 (D. Mass. 1996).

[109] *Id.* at 476–77. The complaint alleged the following: deceit and fraudulent inducement, negligent misrepresentation, breaches of contract and the covenant of good faith and fair dealing, interference with advantageous business relations, violations of the RICO Act, and

and several additional parties in the counterclaim.[110] The counterclaims arose out of allegations that the defendants in counterclaim conspired to blackmail NEP in relation to the original contract to purchase energy. The counterclaims alleged that the conspiracy culminated at an October 1994 meeting in Massachusetts.[111] Two of the defendants in a counterclaim filed motions to dismiss for lack of personal jurisdiction. The court held that personal jurisdiction existed with respect to the counts that arose out of the October meeting in Massachusetts, specifically the claims of civil conspiracy, violation of chapter 93A, § 11 of the Massachusetts Code, defamation, and abuse of process. The court dismissed the remaining counts, concluding that because they did not arise out of the October meeting, these counts did not meet the Massachusetts long-arm statute requirement of a tortious act or omission to occur in Massachusetts. The court did not consider, however, whether it could exercise pendent personal jurisdiction.

These cases illustrate that the federal courts are reluctant to apply pendent personal jurisdiction in traditional minimum contacts cases. Even among those courts that have adopted the doctrine in this context, the statutory and constitutional rationale for the doctrine has not been fully fleshed out.

V. CONSTITUTIONAL AUTHORITY TO EXERCISE PENDENT PERSONAL JURISDICTION IN FEDERAL COURT

The federal judicial power derives from Article III of the Constitution, which grants Congress the power to create lower federal courts and to define the subject matter jurisdiction of those courts. While Article III imposes limits on Congress' power to confer subject matter jurisdiction on the federal courts, it does not control Congress' power to confer personal jurisdiction. Rather, the only constitutional restriction on the federal courts' authority to exercise personal jurisdiction flows from the Due Process Clause.[112] The Due Process Clause of the Fifth Amendment limits Congress' power to confer personal jurisdiction through federal long-arm statutes.[113] Thus, in order to determine whether Congress has the power to grant personal jurisdiction over pendent legal theories, we must consider whether such jurisdiction would violate the Due Process Clause of the Fifth Amendment.

---

violations of MASS. GEN. LAWS ch. 93A, § 11 (1997).

[110] *Milford Power*, 918 F. Supp. 471. The claims against the defendants in counterclaim were: civil conspiracy, defamation, abuse of process, violation of chapter 93A, § 11, and breaches of contract and the covenant of good faith and fair dealing.

[111] *Id.*

[112] Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987).

[113] LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 300 (2d ed. 2000) ("[T]here is universal agreement that the Due Process Clause of the Fifth Amendment limits the power of Congress to enact federal long-arm statutes, while the Due Process Clause of the Fourteenth Amendment limits the power of state legislatures to enact state long-arm statutes.").

Although it is well established that due process limitations on the federal courts' personal jurisdiction derive from the Fifth Amendment rather than the Fourteenth Amendment,[114] the Supreme Court has never defined the jurisdictional limitations imposed by the Fifth Amendment.[115] Rather, the Court's personal jurisdiction jurisprudence pertains only to limitations on state court jurisdiction under the Fourteenth Amendment Due Process Clause. In light of the absence of direct Court guidance, and in recognition of the similarity of the due process clauses of these two amendments—both in language and motivating policies—courts have looked to opinions interpreting the Fourteenth Amendment Due Process Clause for guidance in interpreting the Fifth Amendment Due Process Clause.[116]

The Court has clearly established that the Fourteenth Amendment Due Process Clause requires that a defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[117] The limits of due process under the Fourteenth Amendment are designed to provide fair warning to a defendant that if he or she purposefully directs activities toward a forum, such activities will render him or her subject to jurisdiction in that forum.[118] Once the court has determined that a defendant has purposefully directed his or her activities toward the forum, thus creating minimum contacts, "the[se] contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[119]

Applying these principles to the Fifth Amendment Due Process Clause, a number of courts and commentators have suggested that the appropriate jurisdictional standard under the Fifth Amendment is a national contacts test that

---

[114] *Id*; *see also* Republic of Panama v. BCCI Holdings (Luxemborg) S.A., 119 F.3d 935, 942 (11th Cir. 1997) (noting that when a federal statute provides the basis for exercising personal jurisdiction, it is well established that the Due Process limitations derive from the Fifth Amendment rather than the Fourteenth Amendment).

[115] *BCCI Holdings*, 119 F.3d at 944.

[116] *Id.* at 944 (citing *In re* Chase and Sanborn Corp., 835 F.2d 1341, 1345 (11th Cir. 1988), *overruled on other grounds in* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); *see also* Mathews v. Eldridge, 424 U.S. 319, 331–32 (relying on Fourteenth Amendment cases to interpret Due Process Clause of Fifth Amendment).

[117] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[118] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

[119] *Id.* at 476 (citing *Int'l Shoe*, 326 U.S. at 320). Other factors employed in the minimum contacts analysis include "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

is supplemented by considerations of fairness to the defendant.[120] The national contacts approach first considers whether the defendant has purposefully directed his activities toward the United States and, if so, whether the exercise of jurisdiction comports with notions of fair play and substantial justice.

Applying the national contacts standard to pendent personal jurisdiction, it becomes difficult to imagine a situation that will violate the Fifth Amendment. First, minimum contacts with the nation will generally be easy to establish. For example, any defendant who is a citizen of the United States will have sufficient minimum contacts with the nation to support general personal jurisdiction, just as a citizen is subject to general jurisdiction in his or her respective home state. Moreover, a corporate defendant that is incorporated in the United States or that maintains a place of business in the country, will have sufficient minimum contacts with the nation to support general jurisdiction.[121] Even when the defendant is not a citizen of the United States and has no physical presence there, the national contacts test merely requires that the defendant have purposeful minimum contacts with the nation in order to give rise to a suit. Where a court has personal jurisdiction over an anchor count that arises out of the same factual event as a pendent count, it is likely that the pendent count will be sufficiently connected to the defendant's contacts with the country to support minimum contacts.[122]

The second prong of the analysis, fairness, is also likely to be satisfied because the defendant is already before the court on a related count. Specifically, the burden on the defendant would be relatively insignificant given that the defendant must litigate the anchor count in the forum, the plaintiff's interest in obtaining convenient and effective relief will be furthered by allowing the plaintiff to resolve the entire controversy in a single forum, and the interstate judicial system's interest in obtaining the most efficient resolution of

---

[120] 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.1 (2d ed. 1987); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 38 (1984); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 32–38 (1988); *see also* Peay v. Bellsouth Med. Assistance Plan, 205 F.3d 1206 (10th Cir. 2000); Republic of Panama v. BCCI Holdings (Luxemborg) S.A., 119 F.3d 935, 945–46 (11th Cir. 1997) (citing cases); Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1257–58 (5th Cir. 1994) (citing cases).

It is interesting to note that the Supreme Court has explicitly declined to address the constitutionality of the national contacts test. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 103 n.5 (1987) (citing Asahi Metal Indus. v. Superior Court of California, 480 U.S. 102, 113 (1987) (plurality opinion)).

[121] *BCCI Holdings*, 119 F.3d at 948.

[122] The national contacts test is generally an easier test to satisfy than the traditional minimum contacts test because the court may consider all the defendant's contacts with the country in the aggregate, rather than limiting the analysis to contacts with a particular state, as would be necessary under the Fourteenth Amendment.

controversies would be furthered by allowing pendent counts to be adjudicated along with factually related counts. It would be an unusual situation where the exercise of personal jurisdiction over the pendent count would be so unfair that it would require the court to refuse to adjudicate the entire controversy.

Based upon the foregoing analysis, I conclude that there is constitutional authority to allow federal courts to exercise pendent personal jurisdiction.

VI. STATUTORY AUTHORITY TO EXERCISE PENDENT PERSONAL JURISDICTION IN FEDERAL COURT

A. *Service of Process Pursuant to the Federal Rules of Civil Procedure*

Service of process is the means by which a court asserts personal jurisdiction over a defendant.[123] Federal Rule of Civil Procedure 4(k) permits the federal courts to establish jurisdiction over a person through service of a summons.[124] Accordingly, one must consider whether Rule 4 is intended, either expressly or impliedly, to authorize the exercise of personal jurisdiction over jurisdictionally insufficient counts that are factually related to a jurisdictionally sufficient count.[125]

When interpreting a statute or rule, the initial inquiry should be to ascertain the plain meaning of the statutory language.[126] Rule 4(k)(1) begins by stating that "[s]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant" if the circumstances described in one

---

[123] Stafford v. Briggs, 444 U.S. 527, 553 n.5 (1980); Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 444–45 (1946).

[124] Federal Rule of Civil Procedure 4(k)(1) provides that service of a summons is effective to establish jurisdiction over the person of a defendant:

> (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or
>
> (B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or
>
> (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or
>
> (D) when authorized by a statute of the United States.

Additionally, Rule 4(k)(2) provides that a defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state may be subject to a federal court's personal jurisdiction with respect to claims arising out of federal law as long as the exercise of jurisdiction is consistent with the Constitution and laws of the United States.

[125] It should be noted that while Federal Rule of Civil Procedure 82 states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein," it has been interpreted to refer to subject matter jurisdiction only, and therefore does not limit personal jurisdiction. 14 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 82.02 (3d ed. 1997).

[126] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

of the rule's subsections A through D are present. Notably, this prefatory language does not limit the reach of the court's personal jurisdiction to specific claims.[127] This language contrasts with section 2 of Rule 4(k) which provides that "serving a summons or filing a waiver of service is also effective, *with respect to claims arising under federal law*, to establish personal jurisdiction over the person of any defendant."[128] By including the language limiting the court's jurisdiction to particular claims in section 2 of the rule and omitting any similar restriction in section 1 of the same rule, the plain language of the rule suggests that section 1 is not intended to be limited to particular claims.[129]

The weakness of this argument is that if Rule 4(k)(1) does not pose any limit on the reach of personal jurisdiction, a defendant who is subject to jurisdiction on one count could then be subject to jurisdiction on any other count, whether factually related or not. Such an interpretation would blur the distinction between general and specific personal jurisdiction.[130] Thus, to the extent that specific and general jurisdiction are permanent fixtures in the personal jurisdiction landscape, the language of Rule 4(k)(1) is ambiguous because it supports an interpretation that is contrary to the constitutional structure of the doctrine wherein specific jurisdiction confers less jurisdictional authority than general jurisdiction.

When a statute is ambiguous or silent as to a relevant issue, courts will look to the legislative history to facilitate the interpretation of the statutory language in a manner that would further the legislative goal.[131] Applying this rule of construction to the Federal Rules of Civil Procedure generally, and to Rule 4 specifically, provides evidence that the exercise of pendent personal jurisdiction is

---

[127] The subsections of Rule 4(k)(1) that follow this preface also omit any language restricting jurisdiction to the claim that forms the basis for service of the summons. Sections A through C of the rule define the requirements for amenability to service of summons in terms of the "defendant" rather than the claim. Fed. R. Civ. P. 4(k)(1). For example, the language of section A refers to a defendant "[w]ho could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." *Id.* Similarly, the language of section B refers to a defendant "[w]ho is a party joined under Rule 14 or Rule 19," and the language of section C refers to a defendant "[w]ho is subject to the federal interpleader jurisdiction." *Id.* Section D uses slightly different language—permitting service of a summons "when authorized by a statute of the United States"—but does not restrict jurisdiction to particular claims. *Id.*

[128] FED. R. CIV. P. 4(k)(2) (emphasis added).

[129] Where the legislature uses particular language of construction in one section of a statute and different language in another similar section of the same statute, it intends something different in each case. United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

[130] Pendent personal jurisdiction, on the other hand, would retain the distinction between these two categories of jurisdiction but would extend the reach of specific jurisdiction to all legal theories for recovery that arise out of the same factual scenario.

[131] *See, e.g.*, United States v. James, 478 U.S. 597, 606–10 (1986) (employing legislative history to ascertain statutory meaning); INS v. Errico, 385 U.S. 214, 218 (1966) (using legislative history to discern statutory meaning); *see also* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 40–41 (5th ed. 1992).

consistent with the intent of the rules.

One of the primary objectives of the Federal Rules of Civil Procedure is to enable the federal courts to determine entire controversies at one time. Rule 1 states as much by declaring that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[132] As noted by the Second Circuit, "[t]he word 'action' has been commonly understood to denote not merely a 'claim' or 'cause of action' but the 'entire controversy,' and is so used in the Federal Rules of Civil Procedure."[133] That the rules seek to facilitate the adjudication of whole controversies is evidenced by the procedures established by the rules. Rule 8 permits a litigant to plead multiple theories arising out of the same operative facts. In fact, a litigant is expressly permitted to plead not only multiple theories arising out of the same facts but even multiple contradictory theories.[134] If a litigant fails to present a count and the statute of limitations passes before the litigant realizes the error, Rule 15 allows the litigant to request permission to amend the complaint and add the omitted count as long as it relates to the same transaction or occurrence that is the subject of a pending count.[135] The rules of joinder also enable the court to resolve entire controversies by allowing the parties to bring as an original claim, counterclaim, or crossclaim any counts they have against a party already named in the lawsuit that arise out of the same transaction or occurrence that is the subject of a pending count.[136] The scope of discovery extends to any unprivileged matter that is "relevant to a claim or defense involved in the pending action."[137] Relevance is broadly construed and allows discovery of facts relating to the underlying event, not merely facts that will be admissible at trial to prove the elements of the legal theory that is pleaded.[138] Finally, the rules also provide that:

> [w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or

---

[132] FED. R. CIV. P. 1.

[133] Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719 (2d Cir. 1980) (citing Harvey Aluminum, Inc. v. Amer. Cyanamid Co., 203 F.2d 105, 108 (2d Cir. 1980)). For other instances where the word "actions" has been used to refer to the equivalent of a constitutional case, see, for example, Hagans v. Lavine, 415 U.S. 528, 536–43 (1974) (civil rights); Int'l Controls Corp. v. Vesco, 593 F.2d 166, 175 n.5 (2d Cir. 1979) (securities); Leon Finker, Inc. v. Schlussel, 469 F. Supp. 674, 679–80 (S.D.N.Y. 1979) (trademark).

[134] FED. R. CIV. P. 8(e).

[135] FED. R. CIV. P. 15(c).

[136] FED. R. CIV. P. 18, 13. In fact, Rule 13(a) requires a defendant to join all counterclaims that arise out of the same transaction or occurrence as the opposing party's claim.

[137] FED. R. CIV. P. 26(b)(1).

[138] *Id.*

delay.[139]

The advisory committee's notes to Rule 4 provide additional, albeit limited, support for pendent personal jurisdiction. Rule 4 was significantly overhauled in 1963 when a provision was added allowing a federal court to serve process outside of the state where the court is located when a state law would allow the same type of service by a state court.[140] That same year, Rule 4 was also amended to incorporate the "100-mile provision," which allows service of a summons on an additional party if he or she is served within one hundred miles of the court that issued the summons.[141] The advisory committee's notes for the 1963 amendments to the rules state that "[t]he bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies."[142]

Rule 4 was significantly amended again in 1993 and Rule 4(k) was adopted in its present form. In the accompanying advisory committee's notes, the following paragraph discussed the reach of Rule 4(k)(2),[143] stating:

> This narrow extension [apparently referring to Rule 4(k)(2) specifically] of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to a federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28 U.S.C. § 1367(c).[144]

The above paragraph is frustratingly ambiguous because the reference to "supplemental jurisdiction over related claims"[145] does not specify whether it is referring to subject matter jurisdiction or personal jurisdiction. Supplemental jurisdiction, as established in section 1367, typically refers to supplemental

---

[139] FED. R. CIV. P. 42(a).

[140] 28 U.S.C. app. at 642–43 (1994) (FED. R. CIV. P. 4(e) advisory committee's notes).

[141] *Id.* at 643 (FED. R. CIV. P. 4(f) advisory committee's notes).

[142] *Id.*

[143] Rule 4(k)(2) was the product of the 1993 amendments and it provides:

> If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

FED. R. CIV. P. 4(k)(2).

[144] 28 U.S.C. app. at 654 (1994) (FED. R. CIV. P. 4(k)(2) advisory committee's notes).

[145] *Id.*

subject matter jurisdiction.[146] However, the phrase "supplemental personal jurisdiction" is also found in legal literature.[147]

Looking at the context of the paragraph, the advisory committee's note provides limited support for the assertion of pendent personal jurisdiction. First, the comment pertains to Rule 4(k), a rule which deals exclusively with personal jurisdiction, not subject matter jurisdiction. Second, the language of the comment focuses on how far the rule extends the reach of personal jurisdiction. Specifically, the first sentence of the comment expressly limits the reach of Rule 4(k)(2) to cases where at least one claim arises under federal law. The second sentence emphasizes this point by stating that personal jurisdiction will not be established under the rule if all of the claims arise out of state law—even if there is a basis to assert subject matter jurisdiction over such related state claims.

Lastly, the third sentence explains that when there is a claim involving federal law, Rule 4(k)(2) may provide a basis for personal jurisdiction over that claim and "supplemental jurisdiction"[148] will provide a basis for jurisdiction over related claims. While it is plausible that this third sentence is merely stating that supplemental subject matter jurisdiction would apply to the state claims, such an interpretation leaves unanswered the question of whether the court would have personal jurisdiction over the related state law counts. If, on the other hand, one interprets that third sentence as referring to supplemental personal and subject matter jurisdiction, the sentence would complete the thought initiated in the first and second sentences by stating that personal jurisdiction would extend to cover all of the counts that arise out of the same operative facts as the federal question.[149] Thus, while the advisory committee's notes to Rule 4 are undeniably ambiguous, the reference to the court's power to exercise "supplemental jurisdiction over related claims"[150] at least implies that Rule 4 is intended to encourage adjudication of related claims in one suit.

Further evidence that the federal courts are encouraged to adjudicate entire controversies at one time may be found outside of the Federal Rules of Civil Procedure. Supplemental jurisdiction encourages the consolidation of factually

---

[146] 28 U.S.C. § 1367 (1994).

[147] *See, e.g.*, 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1125 (2d ed. 1987 & Supp.) (referring to "supplemental (pendent) personal jurisdiction"); ROBERT C. CASAD, PERSONAL JURISDICTION IN FEDERAL QUESTION CASES 1606 (1992) (referring to "supplemental personal jurisdiction").

[148] 28 U.S.C. app. at 654 (FED. R. CIV. P. 4(k)(2) advisory committee's notes).

[149] One problem with this interpretation is that the quoted language refers to 28 U.S.C. § 1367, which is commonly considered a source of supplemental subject matter jurisdiction. The language of sections 1367(a) and (c), however, may be read loosely to confer both subject matter and personal jurisdiction over claims that form part of the same case or controversy under Article III. While this interpretation is possible, it is not the prevailing interpretation of the statute at this time. Virtually all courts refer to supplemental jurisdiction as a source of supplemental subject matter jurisdiction.

[150] 28 U.S.C. app. at 654 (FED. R. CIV. P. 4(k)(2) advisory committee's notes).

related counts between parties before the court by providing a basis for federal courts to exercise subject matter jurisdiction over jurisdictionally insufficient counts that arise out of the same transaction or occurrence as a jurisdictionally sufficient count.[151] *Res judicata* similarly encourages litigants to bring all of their factually related claims in one suit. Where a litigant voluntarily appears, presents a case, and is fully heard, all issues arising out of the same controversy are barred from further adjudication by the laws of *res judicata*.[152] Looking at the framework established by these rules and policies, the message is clear that the federal courts are encouraged to adjudicate entire controversies whenever possible.

Tying these threads together, one may conclude that although the plain language of Rule 4(k) is ambiguous as to the reach of personal jurisdiction, the goals of the Federal Rules of Civil Procedure generally, and the intent of Rule 4(k) specifically, support an interpretation of the rule that would allow pendent personal jurisdiction over jurisdictionally insufficient counts arising out of the same factual event as one or more jurisdictionally sufficient counts. Rule 4, however, is not the sole source of authority for the exercise of personal jurisdiction in federal court. Rather, Rule 4 authorizes the assertion of jurisdiction when it is authorized by a federal or state long-arm statute. Thus, in order to determine if there is statutory authority to exercise pendent personal jurisdiction, one must consider the relevant long-arm statute.

B. *Service of Process Pursuant to a Federal Statute Conferring Nationwide Service of Process*

In pendent personal jurisdiction cases where there is an anchor count arising under a nationwide service of process provision, Federal Rule of Civil Procedure 4(k)(1)(D) states that service of a summons is effective to establish personal jurisdiction over a defendant "when authorized by a statute of the United States." To determine whether pendent personal jurisdiction is authorized in this context, one must consider how these two sources of authority—Rule 4 and the applicable federal statute—relate to each other. One interpretation would suggest that once personal jurisdiction is established under Rule 4(k)(1)(D) pursuant to a federal statute authorizing personal jurisdiction over at least one count in the case, the reach of the court's jurisdiction is determined by Rule 4. Because Rule 4 does not expressly describe the reach of the court's personal jurisdiction, the rule would be interpreted according to the overall goals of the federal procedural structure. As noted previously, one of the primary goals of the Federal Rules of Civil Procedure is to encourage resolution of entire controversies at one time, and thus, pendent personal jurisdiction would be a permissible extension of judicial power.

---

[151] 28 U.S.C. § 1367 (1994).

[152] Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525–26 (1931).

An alternative interpretation of Rule 4(k)(1)(D) would be that the reach of the court's jurisdiction is intended to be defined by the underlying federal statute that provides the basis for the assertion of personal jurisdiction. Pursuant to this interpretation, the exercise of pendent personal jurisdiction must be authorized by the federal statute that provides jurisdictional authority over the anchor count. Congress has adopted a number of federal statutes that permit nationwide service of process. While these statutes provide a basis for personal jurisdiction pursuant to Rule 4(k)(1)(D), they are generally silent on the issue of whether personal jurisdiction should extend to factually related pendent counts.[153] To the extent that these statutes fail to directly address the issue of pendent personal jurisdiction, one may look to the legislative purpose supporting the statute to provide guidance in interpreting it.[154] Professor Maryellen Fullerton of the Brooklyn School of Law has identified several primary interests furthered by most congressional grants of nationwide jurisdiction. They include the desire to provide a forum for litigation regarding: (1) problems affecting the national economy, for example, the regulation of securities or antitrust matters; (2) suits involving multiple defendants where no single state has the power to completely resolve the controversy; and (3) suits involving many plaintiffs in distant locations.[155] Overall, the congressional goal is to provide at least one convenient federal forum for these types of statutory claims.[156] To the extent that pendent personal jurisdiction would allow the federal claim to be heard in its full context, without bits and pieces being severed and adjudicated in another forum, such jurisdiction would further the general congressional objectives of these provisions.[157]

Thus, to the extent that pendent personal jurisdiction furthers the legislative goals of the Federal Rules of Civil Procedure and the federal statute that confers personal jurisdiction over the anchor count, federal courts should have statutory permission to exercise pendent personal jurisdiction when the anchor count

---

[153] *See* Jon Heller, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113, 131 (1989).

[154] United States v. James, 478 U.S. 597, 606–10 (1986); INS v. Errico, 385 U.S. 214, 218 (1966).

[155] Fullerton, *supra* note 120, at 63–70.

[156] Heller, *supra* note 153, at 133.

[157] *Id.* at 136 (citing Amtrol, Inc. v. Vent-Rite Valve Corp., 646 F. Supp. 1168, 1175 (D. Mass. 1986)). Further, if litigants are required to adjudicate their federal claims in a different forum than related state claims, plaintiffs may decide to forego one legal theory—possibly the federal one—to avoid the expense and inconvenience of maintaining separate actions in different forums. Thus, allowing pendent personal jurisdiction would promote the legislative goal of providing a convenient forum for the federal statutory claim. Finally, if a federal count is separated from the related state count because pendent personal jurisdiction is rejected, any issues that are determined in the federal action adversely to the plaintiff may preclude the plaintiff from relitigating that issue in a state action concerning the related claim. This possibility could discourage plaintiffs from bringing their federal counts separately. Heller, *supra* note 153, at 136–37.

invokes a nationwide service of process provision.[158]

VII. SERVICE OF PROCESS IN TRADITIONAL MINIMUM CONTACTS CASES

The most frequently invoked source of authority for service of summons in federal court is Rule 4(k)(1)(A).[159] Under this rule, service of a summons is effective to establish personal jurisdiction over a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located. State courts, of course, may only exercise jurisdiction if permission is granted in the state's long-arm statute and if the assertion of jurisdiction does not violate the Due Process Clause of the Fourteenth Amendment.[160] Rule 4(k)(1)(A) compels the federal court to satisfy these same requirements.[161]

The language of Rule 4(k)(1)(A) provides a basis for the initial assertion of personal jurisdiction over a defendant "who could be subjected to the jurisdiction of a court of general jurisdiction,"[162] but once jurisdiction is established, the rule is silent with regard to the reach of the federal court's authority. As noted previously, the text of Rule 4(k) is ambiguous on this point and may reasonably support multiple interpretations.

One interpretation of Rule 4(k)(1)(A) is that once the court acquires personal jurisdiction over at least one count in the complaint, the court's power extends to authorize the exercise of jurisdiction over the entire factual dispute.[163] Pursuant to this interpretation, federal courts would be permitted to hail a defendant into court if at least one count satisfied the requirements of the relevant state long-arm statute and the Due Process Clause of the Fourteenth Amendment. Once the court

---

[158] While this article concludes that the federal courts have statutory permission to exercise pendent personal jurisdiction, the courts are not compelled to exercise this power. Rather, the determination of whether to exercise such jurisdiction is a discretionary one.

[159] Other sections of Rule 4(k) provide authority for service of summons in particular circumstances—when a defendant is joined pursuant to Rule 14 or 19, when a defendant is subject to federal interpleader jurisdiction, when a federal statute authorizes nationwide jurisdiction, or when a defendant is not subject to the general jurisdiction of any state court—but outside of these particular situations, Rule 4(k)(1)(A) provides the primary rule for service of summons in most federal cases. FED. R. CIV. P. 4(k).

[160] JACK H. FRIEDENTHAL et al., CIVIL PROCEDURE 143–44 (3d ed. 1999) (discussing three hurdles to obtaining jurisdiction over a defendant: (1) language of the long-arm statute; (2) judicial interpretation of the language of the long-arm statute; and (3) federal and state constitutional standards).

[161] It is important to note that under Rule 4(k)(1)(A), a federal court must meet the same jurisdictional requirements as a state court regardless of whether the basis for subject matter jurisdiction is diversity or a federal question. FED. R. CIV. P. 4(k)(1)(A).

[162] *Id.*

[163] Of course, if there are separate claims that arise out of separate factual scenarios, each claim would have to satisfy the requirement that the defendant "could be subjected to the jurisdiction of a court of general jurisdiction." *Id.*

has established jurisdiction over the defendant with regard to at least one count, the reach of the federal court's authority under Rule 4 would be determined according to the legislative intent and purposes of the federal procedural structure and the constraints of the Due Process Clause of the Fifth Amendment.[164] Thus, pursuant to this interpretation of Rule 4(k)(1)(A), federal courts would have statutory authority to exercise pendent personal jurisdiction as long as the anchor count satisfies the state long-arm statute and the Due Process Clause of the Fourteenth Amendment and the exercise of personal jurisdiction over the pendent counts is consistent with the legislative intent of the rules of procedure governing the federal courts—namely, that the courts are encouraged to adjudicate entire controversies whenever possible.[165] Once Rule 4(k)(1)(A) is satisfied, the court would then consider whether the assertion of jurisdiction over the pendent count or counts would violate the Due Process Clause of the Fifth Amendment.[166]

An alternative interpretation of Rule 4(k)(1)(A) is that every count in a complaint must independently meet the requirement that the defendant "could be subjected to the jurisdiction of a court of general jurisdiction."[167] Pursuant to this interpretation, if a state court of general jurisdiction is prohibited from entertaining personal jurisdiction over pendent counts, then the federal court would also be prohibited from exercising such jurisdiction. This interpretation of Rule 4(k)(1)(A) requires an initial analysis of: (1) whether the relevant state long-arm statute would permit a state court to exercise pendent personal jurisdiction and (2) whether the exercise of personal jurisdiction over the pendent count would violate the Due Process Clause of the Fourteenth Amendment.

A. *State Long-Arm Statutes*

There are two types of long-arm statutes: (1) those that authorize the exercise of personal jurisdiction under any circumstances that are consistent with the Due Process Clause of the Fourteenth Amendment and (2) enumerated statutes that authorize long-arm jurisdiction based upon particular types of conduct. When the relevant long-arm statute mirrors the requirements of the Due Process Clause, the statutory component of the personal jurisdiction analysis and the constitutional component of the analysis merge together. Thus, pendent personal jurisdiction will be permissible as long as it does not violate the Fourteenth Amendment.

---

[164] *See infra* note 113.

[165] *See infra* text accompanying notes 132–52. Even if there is a practice followed by state courts to dismiss jurisdictionally insufficient pendent counts, one could argue that a federal court could apply pendent personal jurisdiction if the importance of the federal interest in adjudicating entire controversies outweighs the countervailing need for uniformity of outcome between state and federal courts. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

[166] *See infra* note 173.

[167] *Id.*

When the relevant state long-arm statute enumerates specific conduct that must be present to support the assertion of personal jurisdiction, a court must first determine if the statute is satisfied with regard to one or more counts in the complaint. If the statute is satisfied with regard to all of the counts alleged, the court would then consider the constitutionality of the assertion of jurisdiction over the counts. If the statute is satisfied with regard to some but not all counts, the court would consider whether the statute implicitly or explicitly authorizes the assertion of personal jurisdiction over pendent counts as a "tag along" to the anchor count. If the long-arm statute confers jurisdiction over the pendent counts, the court would then consider whether the assertion of personal jurisdiction over the pendent counts would violate the Due Process Clause of the Fourteenth Amendment.

Determining whether a state long-arm statute authorizes pendent personal jurisdiction—either implicitly or explicitly—is difficult because state law is generally silent on the issue.[168] In light of this general silence, a court would have to examine the legislative history of the particular statute to determine if the exercise of pendent personal jurisdiction were consistent with the legislative goal of the long-arm statute or, more generally, with the state's rules of civil procedure. To the extent that the intent of the statute could be interpreted as encouraging the adjudication of entire controversies, one could argue that the exercise of pendent personal jurisdiction is not inconsistent with such a goal.

If there is evidence that the state long-arm statute supports the exercise of pendent personal jurisdiction, the next step in the analysis under Rule 4(k)(1)(A) requires an evaluation of whether the exercise of pendent personal jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.

B. *Due Process Clause of the Fourteenth Amendment*

The Supreme Court's modern personal jurisdiction jurisprudence emerges from an oft-quoted sentence in *International Shoe v. Washington* describing the requirements of the Fourteenth Amendment as follows:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[169]

The Court has refined the minimum contacts principle by recognizing two different types of personal jurisdiction—general and specific personal

---

[168] Electronic database searches of the phrases "pendent personal jurisdiction," "supplemental personal jurisdiction," and "ancillary personal jurisdiction," retrieved no state court cases or state statutes that incorporate these terms.

[169] 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 453 (1940)).

jurisdiction. In *Helicopteros Nacionales de Colombia v. Hall*, the Court described the two categories of jurisdiction as follows:

> [W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant.... When a state exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant.[170]

The threshold for satisfying the minimum contacts test in cases based on general personal jurisdiction is significantly higher than the threshold for satisfying minimum contacts in cases based on specific personal jurisdiction.[171] This makes sense considering that the reach of general jurisdiction is much broader—jurisdiction to adjudicate any dispute—than the reach of specific jurisdiction which is limited to disputes that arise out of or are related to the forum conduct.

Applying these concepts to pendent personal jurisdiction, one must first recognize that the issue of pendent personal jurisdiction only arises when specific personal jurisdiction is asserted over the anchor claim. This is true because general personal jurisdiction is based upon a defendant's relationship with the forum and if the defendant has such a significant relationship with the forum as to give rise to general in personam jurisdiction, there is no limit on the number or type of claims that may be brought against him in the forum. If, on the other hand, the defendant is subject to specific personal jurisdiction for the anchor claim, *Helicopteros* indicates that such jurisdiction provides authority for the court to adjudicate a "suit" arising out of or related to the defendant's forum contacts.[172] Accordingly, pendent personal jurisdiction is permissible if the pendent count is part of the "suit" that forms the basis for the court's assertion of jurisdiction over the anchor count.

In determining whether pendent counts are part of the same "suit" as an anchor count, one must define the characteristics of a "suit."[173] If a "suit" is

---

[170] 466 U.S. 408, 414–15 nn.8 & 9 (1984); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). The Court stated:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum... and the litigation results from alleged injuries that 'arise out of or relate to' those activities.

Id. (citations omitted).

[171] FRIEDENTHAL et al., *supra* note 160, at 125.

[172] *Helicopteros*, 466 U.S. at 414.

[173] The Supreme Court has defined "suit" as:

> [A] very comprehensive [word]... understood to apply to any proceeding in a court

narrowly defined as the particular legal theory that gives rise to a right of recovery, every count must independently satisfy the minimum contacts test. If, on the other hand, a "suit" is more broadly defined as the nucleus of operative facts that give rise to a right of recovery, counts that fail to independently satisfy the minimum contacts test may still be encompassed within the court's personal jurisdiction as long as they arise out of the same factual event that gives rise to the anchor count. Since the Supreme Court has not clearly defined the reach of specific personal jurisdiction in these terms,[174] the Court should adopt the broader interpretation of "suit" for several reasons. First, this interpretation is consistent with the interpretation of "cases" and "controversies" in Article III of the Constitution.[175] As noted previously, the Court has held that because the Constitution confers judicial power over cases or controversies, the reach of federal subject matter jurisdiction extends to all counts that arise out of the same factual event as an anchor count. This reasoning is quite analogous to the reasoning that would justify pendent personal jurisdiction. Second, the exercise of pendent personal jurisdiction is consistent with the Court's jurisprudence interpreting the limitations imposed by the Due Process Clause of the Fourteenth Amendment.

Many courts that have adopted pendent personal jurisdiction have done so on the basis that the doctrine is analogous to supplemental jurisdiction.[176] Supplemental jurisdiction arises out of Article III, which imposes strict limits on the federal judicial power.[177] Pursuant to these limitations, a federal court is

---

> of justice by which an individual pursues [a] remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit.

Kohl v. United States, 91 U.S. 367, 375 (1875) (quoting Weston v. Charleston, 27 U.S. (449 Pet.), 464 (1829)). This definition is too broad to provide a meaningful limitation on specific jurisdiction.

[174] *Helicopteros*, 466 U.S. at 415, n.10 (declining to decide: (1) whether the terms "arising out of" and "related to" describe different standards for acquiring specific jurisdiction and (2) what type of relationship must exist between a defendant's contacts and the suit to justify the exercise of specific jurisdiction).

[175] U.S. CONST. art. III, § 2.

[176] *See, e.g.*, EASB Group, Inc. v. Centricut, 126 F.3d 617, 628 (4th Cir. 1997); Oetiker v. Werke, 556 F.2d 1, 4 (D.C. Cir. 1977); Robinson v. Penn Cent. Co., 484 F.2d 553, 555–56 (3d Cir. 1973).

[177] Article III provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

prohibited from adjudicating a case that falls outside of Article III. Since the earliest days of the federal courts, however, federal judges have stretched the boundaries of Article III to accommodate jurisdictionally insufficient counts that are closely related to, and joined with, counts that satisfy the requirements of Article III.[178] Specifically, the common law doctrines of pendent and ancillary jurisdiction address the need to adjudicate pendent counts as part of the federal courts' obligation to discharge effectively its duties under the constitutional and statutory grants of judicial power.[179] In *United Mine Workers v. Gibbs*,[180] the Court endorsed the doctrine of pendent jurisdiction, noting that:

> Pendent [subject matter] jurisdiction, in the sense of judicial *power*, exists whenever there is... [an anchor claim within the federal court's jurisdiction]... and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case".... The state and federal claims must derive from a common nucleus of operative fact. But, if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent [subject matter] jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims....[181]

Today, it is well accepted that once subject matter jurisdiction is established over one count in a case, the reach of authority conferred by Article III extends to the entire factual event that gave rise to the case or controversy.[182]

A similar analysis may be used to define the reach of specific personal jurisdiction. Specifically, once a court has acquired specific personal jurisdiction with regard to a count, the court may exercise its discretion to extend its authority to all counts that arise out of the same case or controversy. As is the case with supplemental subject matter jurisdiction, the court would exercise discretion in determining whether the exercise of pendent personal jurisdiction would be appropriate in any given case.

U.S. CONST. art. III, § 2.

[178] FRIEDENTHAL et al., *supra* note 160, at 65.

[179] *Id.*

[180] 383 U.S. 715 (1966).

[181] *Id.* at 725–27 (citations omitted).

[182] In 1990, Congress adopted the supplemental jurisdiction statute, 28 U.S.C. § 1367 (1994), which essentially codified the doctrines of pendent and ancillary subject matter jurisdiction. This statute provides that supplemental jurisdiction shall extend to claims that "form part of the same case or controversy under Article III." *Id.*

While most courts that have applied pendent personal jurisdiction have done so in accordance with an analysis that relies largely upon the analogy to subject matter jurisdiction, the weakness in this argument lies in the fact that these two types of jurisdiction serve different purposes and arise out of different constitutional provisions.[183] Subject matter jurisdiction derives from Article III and functions as a restriction on federal sovereign power, whereas personal jurisdiction derives from the Due Process Clauses of the Fifth and Fourteenth Amendments and protects an individual liberty interest.[184] These differences lead to further legal consequences in the application of the doctrines. For example, consent of the parties is irrelevant to the existence of subject matter jurisdiction because sovereign power cannot be controlled by action of the parties.[185] On the other hand, a defendant may consent or waive his or her objection to the exercise of personal jurisdiction because personal jurisdiction is an individual right.[186] Moreover, to the extent that the doctrine of supplemental jurisdiction rests upon an interpretation of the case or controversy requirement, this language is not directly applicable to the doctrine of personal jurisdiction. Thus, one cannot simply accept the constitutionality of pendent personal jurisdiction on the basis that it is analogous to supplemental subject matter jurisdiction. Rather, it must also be shown that the exercise of pendent personal jurisdiction is consistent with the authority conferred by the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause permits a court to exercise specific personal jurisdiction in two instances: (1) when a defendant consents or waives his or her objection to personal jurisdiction or (2) when a defendant has purposeful minimum contacts with the forum that give rise to the suit. When jurisdiction rests upon express consent by the parties, as for example, in a forum selection clause, the scope of jurisdiction depends upon the intent of the parties. If the forum selection clause is enforceable as to any counts, the scope of the jurisdiction will generally depend upon the interpretation of the agreement as opposed to limitations imposed by due process.[187] Due process concerns arise, however, when a defending party is subject to personal jurisdiction in the absence of an express agreement. When jurisdiction rests upon implied consent, waiver, or minimum contacts, the scope of jurisdiction will be limited by due process.

When a plaintiff files a lawsuit, the plaintiff requests that the court adjudicate

---

[183] Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 701–02 (1982).

[184] *Id.*

[185] *Id.*

[186] *Id.* at 703–04.

[187] *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196 (8th Cir. 1990) (holding the forum selection clause enforceable and that there was no need to meet due process). *But see* Siemer v. Learjet Acquisition Corp., 966 F.2d 179 (5th Cir. 1992) (holding that the exercise of jurisdiction pursuant to a forum selection clause would violate the Due Process Clause with regard to all counts raised).

the dispute and order relief from the defendant. In filing the complaint against the defendant, the plaintiff impliedly consents to personal jurisdiction in that court. In *Adam v. Saenger*,[188] the Court held that the Fourteenth Amendment is not violated when a plaintiff, who has filed suit against a defendant, is deemed to have consented to the exercise of personal jurisdiction with regard to counterclaims asserted by the defendant. In reaching this conclusion, the Court considered the unfair asymmetry that would result if the plaintiff could hail a defendant into a forum and retain immunity from suit for the defendant's counterclaims: "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."[189]

Not surprisingly, the Due Process Clause of the Fourteenth Amendment does not delineate the scope of implied consent according to the legal theory pursued in the original suit or the legal theory pursued by the defendant. Rather, the scope of the plaintiff's implied consent is defined in terms of what would be necessary for a fair resolution of the litigation between the parties. For example, it is well accepted that by filing a lawsuit, a plaintiff impliedly consents to personal jurisdiction over compulsory counterclaims brought by the defendant.[190] A compulsory counterclaim is one which arises out of the same transaction or occurrence as the original suit and thus involves a substantial overlap of facts with the original suit. In terms of efficiency, consistency of judgments, and fairness, justice is best served by allowing defendants to adjudicate compulsory counterclaims against plaintiffs. Following this reasoning, due process is not violated by the exercise of personal jurisdiction over a plaintiff based on a theory of implied consent.

If due process permits courts to imply consent to personal jurisdiction over compulsory counterclaims, due process should also permit courts the discretion to exercise pendent personal jurisdiction. First, both situations involve an anchor count which independently satisfies the requirements of personal jurisdiction. In the case of implied consent, the anchor count is the plaintiff's original suit hailing the defendant into the forum. Second, both situations involve a factually related count that is allowed to "tag along" with the anchor count. That is, the related count is permitted solely because it is joined with a jurisdictionally sufficient count that arises out of the same facts. In the case of implied consent, the defendant is permitted to assert a compulsory counterclaim even if the plaintiff

---

[188] 303 U.S. 59 (1938).

[189] *Id.* at 67–68; *see also* Schwinn Bicycle Co. v. TI Reynolds 531 Ltd., 182 B.R. 526, 531 (Bankr. N.D. Ill. 1995).

[190] The plaintiff's implied consent to jurisdiction has been deemed even broader than merely encompassing factually related counterclaims. FRIEDENTHAL et al., *supra* note 160, at 108. Some courts have held that a plaintiff impliedly consents to personal jurisdiction over any counterclaim raised by a defendant, whether factually related or not.

would not have been amenable to personal jurisdiction in the forum in the absence of the original suit. When a court exercises pendent personal jurisdiction, it asserts power over an otherwise jurisdictionally insufficient count because it is joined with a jurisdictionally sufficient count that arises out of the same facts. If due process is not violated when a plaintiff is deemed to have consented to compulsory counterclaims, it should similarly not be violated by the exercise of personal jurisdiction over factually related pendent counts.[191]

The Due Process Clause of the Fourteenth Amendment should not be interpreted to limit the scope of specific jurisdiction to particular legal theories when the basis for jurisdiction over the anchor count is minimum contacts rather than consent. First, the Due Process Clause must be read in light of the power and obligation imposed upon the federal courts to adjudicate cases and controversies in Article III. If the federal courts are to discharge their duties under Article III, the Due Process Clause must be broad enough to permit courts to entertain personal jurisdiction over all counts that arise out of a common nucleus of operative facts. Second, while the Supreme Court has never expressly addressed the scope of specific personal jurisdiction, the Court has recognized that the due process limitations imposed upon a court's authority to exercise personal jurisdiction must be considered in the context of the entire dispute between the parties. In *Keeton v. Hustler Magazine, Inc.*,[192] the Court held that personal jurisdiction existed to adjudicate an entire controversy where only a portion of the controversy arose out of the defendant's forum contacts. The Court upheld the exercise of specific jurisdiction over a multistate lawsuit seeking damages from the nationwide circulation of a magazine even though only a small portion of the damages arose from the defendant's conduct in the forum state. In *Keeton*, a resident of New York filed a libel suit against Hustler Magazine[193] and other defendants in the United States District Court for the District of New Hampshire. The plaintiff alleged that she was libeled in five issues of the magazine, all of which were circulated nationwide. Hustler Magazine's only contacts with New Hampshire consisted of the sale of approximately 10,000 to 15,000 magazines in the state each month. The Court held that the regular monthly sales of thousands of magazines in New Hampshire would ordinarily satisfy the requirement of the Due Process Clause for a libel claim arising out of those magazines. The Court went on to state that:

---

[191] Arguably, the situations are distinguishable to the extent that a plaintiff voluntarily chooses to bring suit in a forum, but a defendant is typically hailed into the forum involuntarily. Both parties, however, exercise control over their jurisdictional exposure. While a plaintiff has control over whether to file suit and thus create an "anchor" count to which counterclaims may be joined, a defendant has control over her conduct in the forum that gives rise to minimum contacts over the anchor count.

[192] 465 U.S. 770 (1984).

[193] At the time of the litigation, Hustler Magazine, Inc. was an Ohio corporation with its principal place of business in California. *Id.* at 772.

> [I]t is certainly relevant to the jurisdictional inquiry that petitioner is *seeking* to recover damages suffered in all States in this one suit. The contacts between respondent and the forum must be judged in the light of that claim, rather than a claim only for damages sustained in New Hampshire. That is, the contacts between respondent and New Hampshire must be such that it is "fair" to compel respondent to defend a multistate lawsuit in New Hampshire seeking nationwide damages for all copies of the five issues in question, even though only a small portion of those copies were distributed in New Hampshire.[194]

Concluding that New Hampshire had an expressed interest in asserting jurisdiction over plaintiff's claim and an interest in cooperating with other states, the Court held that defendant's New Hampshire contacts were sufficient to warrant the district court's exercise of jurisdiction over the multistate libel suit.[195]

While the *Keeton* case did not involve pendent personal jurisdiction specifically, it does provide evidence that the Due Process Clause is broad enough to permit adjudication of entire controversies. In *Keeton*, the Court relied upon the defendant's circulation of the offending magazine in New Hampshire as the minimum contact that gave rise to the claim for damages from the circulation in New Hampshire.[196] Once the minimum contacts test was satisfied with regard to at least a portion of the damages sought, the Court then considered whether it would be fair to the defendant to allow the court to adjudicate the entire case arising out of the same factual event—the circulation of the same issues of the magazine in states other than New Hampshire.[197]

This analysis is similar to one that would be employed to determine if personal jurisdiction should be extended to pendent counts. First, the court would have to find jurisdiction over the anchor count. Next, the court would have to determine whether the pendent count arose out of the same nucleus of operative fact, thus comprising part of the same constitutional case as the anchor count. Finally, the court would have to determine whether the exercise of jurisdiction over the pendent count would be fair to the defendant. In most instances, requiring the defendant to defend a pendent count will not be unfair because the defendant already will be properly before the court on one count, and therefore, the adjudication of the factually related pendent count will not pose an unreasonable burden.

I conclude that the present reluctance of courts to apply pendent personal jurisdiction in conventional minimum contacts cases is not warranted. Rather, specific personal jurisdiction is strong enough to allow courts to exercise pendent personal jurisdiction.[198]

---

[194] *Id.* at 775.
[195] *Id.* at 777–78.
[196] *Id.* at 775.
[197] *Id.* at 775 n.76.
[198] To date, there are no published state court decisions or long-arm statutes that apply or

VIII. CONCLUSION

During the nearly two decades since the Supreme Court recognized a bifurcated doctrine of personal jurisdiction, it has made little progress in defining the characteristics that distinguish general and specific jurisdiction. One of the issues that has repeatedly evaded the Court's attention is the scope of specific jurisdiction. While we know that the scope of general jurisdiction extends to any suit brought against a defendant, and specific jurisdiction is limited to "suits" that arise out of the defendant's contacts with the forum, the precise contours of specific jurisdiction remain unclear. In recognition of this theoretical deficiency, this article examines a particular category of cases—those involving jurisdictionally insufficient counts that arise out of the same factual event as jurisdictionally sufficient counts brought against the same defendant—to illuminate the theoretical question surrounding the scope of specific jurisdiction. The article concludes that in most instances there will be no constitutional or statutory impediment to the federal court's exercise of pendent personal jurisdiction regarding jurisdictionally insufficient counts that arise out of the same constitutional case as a jurisdictionally sufficient anchor count, whether the basis for jurisdiction over the anchor count is a nationwide service of process statute or a state long-arm statute. Finding constitutional support for the exercise of pendent personal jurisdiction pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments, the article suggests that there is no constitutional limitation that would require federal or state courts to define specific jurisdiction narrowly according to particular legal theories supporting recovery. Rather, the Due Process Clauses in both the Fifth and Fourteenth Amendments support a broad interpretation of specific jurisdiction that would allow a federal or state court to adjudicate the entire constitutional case brought against a defendant.[199]

---

refer to the doctrine of pendent personal jurisdiction. While it is beyond the scope of this paper to conduct an analysis of the language of every state long-arm statute (and state constitution) to determine if pendent personal jurisdiction would be authorized, there is no theoretical obstacle that would preclude a state court from adopting the doctrine of pendent personal jurisdiction. First, the exercise of jurisdiction must meet the standards prescribed in the state long-arm statute. Second, the exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment. With regard to the first requirement, many state long-arm statutes permit any exercise of personal jurisdiction that is consistent with the Fourteenth Amendment, thus obviating the need for a specific analysis of the long-arm. Where the relevant long-arm statute enumerates particular conduct that must be satisfied, a state court must analyze whether the language of the statute and the legislative history support the assertion of jurisdiction over pendent counts. With regard to the second requirement, this paper presents support for the conclusion that the Due Process Clause of the Fourteenth Amendment would not be violated by the exercise of pendent personal jurisdiction.

[199] While this article has focused on the application of pendent personal jurisdiction in federal court, much of the analysis that applies to pendent personal jurisdiction in traditional minimum contacts cases filed in federal court would be the same for cases filed in state court.

The only notable differences in the analysis would be: (1) the federal minimum contacts cases are constitutionally limited by the Due Process Clause of the Fifth Amendment (but, of course, Federal Rule of Civil Procedure 4(k)(1)(A) requires satisfaction of the Fourteenth Amendment Due Process Clause), whereas the state minimum contacts cases are constitutionally limited by the Due Process Clause of the Fourteenth Amendment and (2) any differences between the Federal Rules of Civil Procedure and the relevant state rules of procedure.